92-875

No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1992

HEIRS OF MRS. M.H. CRAWFORD: Diane E. Honeycutt, Fern E. Honeycutt, Ellen Goldsworthy, Ralph Vernon Honeycutt, Calvin Guy Honeycutt, Eileen A. Honeycutt, Marjorie J. McGuire, Olin I. McGuire, Alfred W. McGuire, Shirley J. MacDonald, Margaret McCollum, Lena Nicholson, Helen Harder, Raymond Eisele, Frank Eisele, Darrell Eisele, Marie Holdren

PETITIONERS,

v.

HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Barnaby W. Zall
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Counsel for Petitioners

November 20, 1992

No. _____

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Supreme Court Of The United States

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HEIRS OF MRS. M.H. CRAWFORD: Diane E. Honeycutt, Fern E. Honeycutt, Ellen Goldsworthy, Ralph Vernon Honeycutt, Calvin Guy Honeycutt, Eileen A. Honeycutt, Marjorie J. McGuire, Olin I. McGuire, Alfred W. McGuire, Shirley J. MacDonald, Margaret McCollum, Lena Nicholson, Helen Harder, Raymond Eisele, Frank Eisele, Darrell Eisele, Marie Holdren

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(202) 659-8201
Counsel for Petitioners

November 20, 1992

QUESTION PRESENTED:

Whether the heirs of a private assignor of mineral rights may utilize the administrative rejection of registration of the assignment by a federal agency to void a 57-year-old assignment otherwise valid under state law and effective between the private parties?

LIST OF PARTIES:

Pursuant to Rule 29.1, Rules of the Supreme Court, counsel for Petitioners certifies that the complete list of all parties to the proceedings below and all parties and persons believed to be interested in the outcome of this Petition includes:

Diane E. Honeycutt

Fern E. Honeycutt

Ellen Goldsworthy

Ralph Vernon Honeycutt

Calvin Guy Honeycutt

Eileen A. Honeycutt

Marjorie J. McGuire

Olin I. McGuire

Alfred W. McGuire

Shirley J. MacDonald

Margaret McCollum

Lena Nicholson

Helen Harder

Raymond Eisele

Frank Eisele

Darrell Eisele

Marie Holdren

International Searchers, Inc.

Herbert O. Norbeck

Kermit G. Norbeck

Sterling M. Norbeck

Helen N. Bernard

Julius A. Bernard

Colette M. Norbeck

Virginia Norbeck

Jane S. Norbeck, Trustee of the Jane Norbeck Trust dated November 20, 1963

BARNABY W. ZALL

Counsel for Petitioners

TABLE OF CONTENTS

Table of Authorities i

Opinions Below 2

Statement of Jurisdiction 2

Statutes and Regulations Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

I. The Correct Federal Policy is Non-Entanglement 9

II. The Assignment is Valid Under Montana Law 11

III. The Assignment is Valid Under Federal Law 13

IV. The Montana Supreme Court Misinterpreted and Misapplied the Effect of the Federal Agency's Action 15

V. The Montana Supreme Court's Interpretation Should Be Reversed 16

Conclusion 16

Appendix . . . . .

Opinion of the Montana Supreme Court . . . . . App. 1

Opinion of the 16th Judicial District Court App.7

Assignment . . . . . App. 20

Federal Statutes . . . . . App. 22

Federal Regulations . . . . . App. 25

TABLE OF AUTHORITIES

CASES:

Aronow v. Bishop, 86 P.2d 644 (Mont. 1938) 11,12
Gibbons v. Pan American Petroleum Corp, 262 F.2d 852 (10th Cir., 1958) 15
Herigstad v. Hardrock Oil Co., 52 P.2d 171 (Mont. 1935) 11
Hobbs v. McLean, 117 U.S. 567 (1886) 9
In Re: "Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1989), *cert. denied, Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981) 13
Issacs v. De Hon, 11 F.2d 943 (9th Cir. 1926) 11
Martin v. National Surety Co., 300 U.S. 588 (1937) 8, 9
McKenzie v. Irving Trust Co., 323 U.S. 365 (1945) 9
Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 13
Oasis Oil Co. v. Bell Oil & Gas Co., 106 F. Supp. 954 (W.D. Okla. 1952) 10, 15
United States v. Little Lake Misere Land Co. Inc., 412 U.S. 580 (1973) 14
Wallis v. Pan-American Petroleum Corp., 384 U.S. 63 (1966) ..... *Passim*

STATUTES AND REGULATIONS:

28 U.S.C. § 1257(a) (1990) 2
30 U.S.C. § 187a (1990) 3, 7, 15
Mineral Leasing Act of February 25, 1920 (41 Stat. 437) 2, 8, 10
43 C.F.R. § 3106.7-1 (1991) 3, 14
Department of Interior Oil and Gas Regulations Para. 12 1/2 (1920) 3

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HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioners (hereafter "Crawford Heirs") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Montana, entered in the above-entitled proceeding on August 25, 1992.

OPINIONS BELOW:

The opinion of the Supreme Court of Montana, *Norbeck, Trustee v. Crawford, et. al.*, No. 92-113 (Mont. S.Ct. August 25, 1992), is unreported but is reprinted in the Appendix hereto at Pages 1-6.

The opinion of the District Court of the Sixteenth Judicial District, In and for the County of Fallon, Montana, *Norbeck, Trustee v. Crawford, et. al.*, No. DV 5436 (Mont. 16th D.C., Fallon County, January 21, 1992), is unreported, but is reprinted in the Appendix hereto at Pages 7-19.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Montana was entered on August 25, 1992, affirming the decision of the Sixteenth Judicial District Court of Montana, entered January 21, 1992. The petition for a writ of certiorari is being filed on or before November 23, 1992.

The jurisdiction of this Court to review the judgment of the Supreme Court of Montana is invoked under 28 U.S.C. § 1257(a) (1990).

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are involved in this case:

STATUTES

The Mineral Leasing Act of February 25, 1920 (41 Stat. 437), effective at the time of the assignment herein, is reprinted in the Appendix hereto at Pages 23-24.

The current version of the statute (30 U.S.C. § 187a (1990)), effective at the time of the quiet title action herein, is reprinted in the Appendix hereto at Pages 22-23.

REGULATIONS

Department of Interior Oil and Gas Regulations (Paragraph 12 1/2 (1920)), effective at the time of the assignment herein, are reprinted in the Appendix hereto at Page 25.

The current version of the regulation (43 C.F.R. § 3106.7-1 (1991)), effective at the time of the quiet title action herein, is reprinted in the Appendix hereto at Page 25.

STATEMENT OF THE CASE

This is a dispute between two private parties to an assignment of a property right in the proceeds of an oil and gas lease on certain federal lands in the Baker Gas Field in Fallon County, Montana. The assignment is reprinted in the Appendix hereto at Pages App. 20-21. The material facts are undisputed.

On October 10, 1934, George Norbeck of Redfield, South Dakota, was issued a 20-year oil and gas lease from the U.S. Department of Interior. The lease included a right of renewal.

This lease was subject to an operating agreement Norbeck entered into with a private company, Fidelity Gas Company. Norbeck retained record title of the lease with a right to 25 percent of the net proceeds of production. Norbeck appointed Fidelity as his attorney-in-fact to obtain renewal leases on his behalf. Fidelity later assigned operating rights in the deep formations to Shell Oil Company.

Eight months after issuance of the lease, on June 10, 1935, in Billings, Montana, Mr. and Mrs. George Norbeck assigned all their rights, title and interest in the lease to Mrs. M. H. Crawford of Santa Ana, California. The assignment was unconditional and provided express warranties to Mrs. Crawford. The assignment was to take effect immediately — "This assignment effective as of June 10, 1935" — although Norbeck agreed to undertake all necessary renewals and other applications until Mrs. Crawford's assignment was recorded by the Department of Interior.

On August 5, 1935, an attorney for George Norbeck sent Mrs. Crawford's assignment to the Interior Department's General Land Office (predecessor of the Bureau of Land Management), which recorded and managed leases for the federal government. The General Land Office wrote to Norbeck's attorney on January 31, 1936, rejecting the registration of this assignment because Norbeck's attorney failed to include a new required bond and failed to document Mrs. Crawford's citizenship and other holdings under the Mineral Leasing Act. There is no indication that Norbeck's lawyer notified Mrs. Crawford in Santa Ana, California, of the rejected assignment. Norbeck's lawyer did not resubmit the required information after receiving the rejection.

On May 1, 1936, Mrs. Crawford's assignment was recorded in the office of the Clerk and Recorder of Fallon County, Montana, at P. 252 of the Miscellaneous Book of Records. Norbeck never took any other action on the lease.

Norbeck died on October 22, 1938. All further actions in connection with the lease, including the posting of bonds, rental payments, and lease renewals, were undertaken by the operating agent, Fidelity Gas Company, or a sister company of Fidelity, Montana-Dakota Utilities Company.

Twenty years later, in 1954, Fidelity Gas applied for a renewal lease on behalf of Mrs. Crawford. After reviewing its records, the Land Office, however, refused to issue the renewal because Fidelity Gas did not have a power of attorney from Mrs. Crawford. The Land Office also still listed Norbeck as the record lessee.

Under the assignment, Fidelity was entitled to continue submitting renewal lease applications on behalf of Norbeck and it did so. To satisfy the Land Office's registration requirements and without contacting any other party, Fidelity then applied for a renewal lease as attorney-in-fact for Norbeck. The Land Office accepted this application and issued a renewal to Norbeck. In 1964 Fidelity applied for a second renewal as attorney-in-fact for Norbeck, and the renewal was issued.

The second renewal lease was put on producing status in 1968 by Shell Oil Company. Since then, some $420,000 in production payments have been allocated to the 25 percent interest assigned to Mrs. Crawford. Shell Oil Company continued to pay proceeds under the assignment into a "suspense account" titled for Mrs. Crawford. None of the payments were ever made to Mrs. Crawford.

On October 28, 1968, after the lease was put on producing status, the Land Office wrote to the "heirs of George Norbeck" that federal regulations required them to establish their succession to his interest in the lease. The Norbeck heirs essentially let the inquiry lie dormant until 1987, when they applied for the full interest in the lease.

On August 18, 1987, the Bureau of Land Management (BLM), the successor to the Land Office, notified the Norbeck heirs that it recognized their interest in the lease. At the bottom of its notice to the Norbeck heirs, the BLM stamped the statement: "Approval does not warrant that either party to this transfer holds legal or equitable title to this lease."

The Norbeck heirs transferred all of their interest in the lease to the Jane Norbeck Trust, Julius A. Bernard, Trustee. Subsequently, Jane S. Norbeck took over as trustee (Norbeck Trustee). On September 29, 1988, Shell Oil, which still recognized Mrs. Crawford's assignment, notified the trustee that Shell had completed its review of the claim to the interest but would not distribute the proceeds before completion of a quiet title action.

On October 22, 1990, the Norbeck Trustee began a quiet title action before the District Court for the Sixteenth Judicial District of Montana. No one was able to contact Mrs. Crawford. A default judgment for lack of appearance was taken against Mrs. Crawford. The District Court quieted title to Jane S. Norbeck, Trustee, on December 7, 1990.

Subsequently, the heirs of Mrs. M.H. Crawford (the Crawford heirs) learned of the quiet title action and filed a motion for relief from judgment. The District Court vacated the default and judgment on June 4, 1991. The Crawford heirs sought to quiet their title to 39/40ths of the disputed interest (a missing heir holds the remaining 1/40th interest).

The Sixteenth Judicial District Court of Montana formulated the federal question before it as:

> the effect of the 1935 assignment of an interest in a federal oil and gas lease on the rights of the parties in light of (1) the rejection and lack of approval by the Secretary of the United States Department of the Interior . . .

Norbeck, Trustee v. Crawford, et. al., No. DV 5436, p. 5 (Mont. 16th D.C., Fallon County, January 21, 1992), *reprinted* at App. 11.

The District Court in its memorandum answered its federal question:

> First the Court determines as a matter of law that the rejection of the assignment of federal lease in this case does not necessarily render the assignment void as between the parties. . . Essentially, the assignment was rejected on procedural grounds. There is no evidence that the assignee, M.H. Crawford [sic], was not qualified or that the assignment itself was in any way deficient.

App. 12.

The District Court further stated:

> However, this does not mean that the rejection of the assignment is without consequences. The public policy, as stated in 30 U.S.C., Sec. 187a, is that the assignment is not effective to transfer an interest until the Secretary approves the assignment. . . . Therefore, the Court concludes as a matter of law that, Plaintiffs are entitled to all proceeds attributable to the leasehold interest in question until the first day of the lease month following Defendants filing of a proper application for approval of the assignment as provided by federal law.

App. 12-13.

On August 25, 1992, the Montana Supreme Court affirmed the lower court's decision, citing only the federal statute and one federal District Court case as support for its position that Mrs. Crawford "failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a." App. 5.

REASONS FOR GRANTING THE WRIT

Supreme Court Rules 10.1(b) and (c) indicate that grounds for issuing the writ may exist when a decision by the highest court of a state conflicts with decisions of federal courts of appeal or of this Court. Both of those con-

flicts appear in this case.

The basic issue in this case is whether the 1934 assignment between private parties was nullified by the refusal of the Department of Interior to register the assignment. A decision in favor of the heirs of the assignor would result in their receiving a windfall not authorized by state or federal law — a position rejected by virtually all federal courts to examine this question.

In addition, the decision by the Montana Supreme Court directly contravenes this Court's decision in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). In *Wallis*, this Court applied the doctrine that, in the absence of a "significant conflict between some federal policy or interest and the use of state law in the premises," state law is to "govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920." 384 U.S. at 68, 67.

The federal policy governing assignments of mineral leases is to avoid entanglements in disputes between private parties over leases under the Mineral Leasing Act. *Wallis*, 384 U.S. at 70, n.8. This policy is consistent with federal policies relating to assignments of other federal benefits. *See, e.g., Martin v. National Surety Co.*, 300 U.S. 588, 594-95 (1937). The Montana Supreme Court mistakenly assumed that the appropriate federal policy was simply to prevent **and abrogate** assignments of mineral leases.

In this case, the Montana Supreme Court, ignoring *Wallis*, the correct federal policies, federal regulations (even the 16th Judicial District Court's finding that the rejection of the registration of the lease does not necessarily render the assignment void as between the parties), cited only a federal statute and two federal cases before ruling that the lease assignment was nullified. This superficial view was error.

Under Montana law, the assignment was valid; federal policy defers to that judgment. The Montana Supreme Court's misapplication of federal law has ignored federal policy and altered the property rights of the parties, to Petitioners' detriment. If the Montana Supreme Court's decision is allowed to stand, the settled state of the law under *Wallis* and recognition of the correct federal policy will be confused, threatening other propertyholders' rights and threatening to entangle the federal government in an endless series of disputes between private parties.

I. THE CORRECT FEDERAL POLICY IS NON-ENTANGLEMENT.

It is settled law that federal statutes prohibiting assignments of claims or contracts "are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945), *citing, Martin v. National Surety Co.*, 300 U.S. 588, 594-595 (1937).

The object of standing apart from private disputes, even in the presence of clear anti-assignment language in Mineral Leasing Act leases, is to prevent the federal government from becoming embroiled in disputes between private parties. "In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin*, 300 U.S. at 594, *citing, Hobbs v. McLean*, 117 U.S. 567, 576 (1886).

Both the Montana courts in this case ignored this settled federal doctrine, and the policy which stands behind it. The Montana 16th District Court, for example, said that the public policy behind the anti-assignment language in the Mineral Leasing Act was simply to negate lease assignments not approved by the Secretary of Interior, even as between private parties, App. 12, a position im-

plicitly adopted by the Montana Supreme Court in its finding that Mrs. Crawford "failed to perfect" her interest with the Secretary of Interior. App. 5. Both the Montana Supreme Court and the 16th Judicial District Court cite only *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F. Supp. 954 (W.D. Okla. 1952), as support for their interpretation; there are no other cases which support their position.

In fact, the federal government's rights were never in jeopardy. The government always had the power to institute forfeiture proceedings under Section 31 of the Mineral Leasing Act, a power not available to private parties.

Under the Montana Supreme Court's interpretation, the Norbeck Heirs would obtain a windfall benefit from a statutory provision intended to protect the federal government, and which this and other Courts have said may only be invoked by the Secretary. The Crawford Heirs, on the other hand, would be deprived of the benefits of a private assignment, valid under state law and effective between the private parties.

The policy of avoiding entanglements in private disputes is the federal policy which should be upheld in this case, not the unsupported policy of "perfection" with the Secretary identified by the Montana Supreme Court. It is the avoidance of entanglements which most clearly upholds the principles this Court enunciated in *Wallis*. Yet under the Montana Supreme Court's interpretation, the actions of the federal agency will be brought into any dispute between private parties concerning leases under the Mineral Leasing Act.

II. THE ASSIGNMENT IS VALID UNDER MONTANA LAW

A. The Principal Test is State Law Rights Between the Private Parties.

Twenty-five years ago this Court applied the doctrine that state law is to "govern the dealings of private parties in an oil and gas lease validly issued under the Mineral Leasing Act of 1920." *Wallis*, 384 U.S. at 67. *Wallis* should have been the starting point for the Montana Supreme Court; instead there was no discussion of state law. If state law had been considered, the assignment would have been effective.

B. Montana Law Does Not Permit Assignors to Take Advantage of Anti-Assignment Language in Federal Mineral Leases.

The inability of an assignor to take advantage of anti-assignment language in oil and gas leases was well-known in Montana at the time of the assignment. In *Herigstad v. Hardrock Oil Co.*, 52 P.2d 171 (Mont. 1935), for example, the Montana Supreme Court held that: "It is true, as asserted by the defendant, that the permit is not assignable without the consent of the Secretary of the Interior, but, on suit by an assignee, the defendant cannot take advantage of this department's regulation. *Isaacs v. De Hon*, 11 F.2d 943 (9th Cir. 1926)." 52 P.2d at 174.

Further, in *Aronow v. Bishop*, 86 P.2d 644 (Mont. 1938), the Montana Supreme Court was asked by an assignee to invalidate assignments of oil and gas leases between private parties because they were not approved by

the Land Office. Instead, the Court ruled:

> The next contention of plaintiff is that the assignments are not valid as required by rules promulgated by that department. These rules were promulgated for the benefit of the Department of the Interior, and the plaintiff here cannot take advantage of that regulation to defeat assignments. (citation omitted) The lack of approval by the Secretary of the Interior can only be raised by the government. (citation omitted)

86 P.2d at 647-648. As shown below, the Secretary properly stayed out of this private dispute. No one else, including respondents, could raise the defense of the anti-assignment clause.

C. The Private Parties Treated The Assignment As Effective.

In this case, until 1987, every private party involved treated the assignment as valid between the parties (and, as shown below, the federal agency disclaimed any intention to disturb private rights between the parties):

Mrs. Crawford: Mrs. Crawford was required under state law to record her interest in order to perfect her interest and to give constructive notice of the assignment. She did so, after the Land Office rejected registration of the assignment (the record does not indicate whether she knew of the rejection).

Fidelity Gas Company: Fidelity Gas Company tried to renew the lease in 1954 under the assignment in Mrs. Crawford's name. Under the BLM rules and under the assignment itself, Fidelity was entitled to continue renewing the lease under Norbeck's name and it did so.

Shell Oil Company: Shell Oil Company was required to recognize interests recorded in county records. It did so, segregating the lease proceeds in an account labeled for Mrs. Crawford, and escheating unclaimed proceeds to

the State of North Dakota in Mrs. Crawford's name (which also treated Mrs. Crawford's assignment as valid).

The Norbeck Heirs: The Norbeck heirs explicitly disclaimed any interest in the lease in 1949; they apparently never even heard about the lease until contacted by the Bureau of Land Management in 1968. Even after being contacted by BLM, they waited another 18 years before seeking an interest in the lease proceeds. They apparently didn't even check the land records in Fallon County before 1988, and by then had lost contact with Crawford.

There is no prohibition under state law against the assignment. The assignment was recorded. The parties treated the assignment as valid. Interested third parties, including government agencies, treated the assignment as valid. Thus, under state law, the Crawford heirs still have a valid assignment.

III. THE ASSIGNMENT IS VALID UNDER FEDERAL LAW.

A. Federal Policy Is To Leave The Validity of Assignments of Mineral Leases to the States.

The validity of the assignment to Mrs. Crawford will not be disturbed by federal law. In *Wallis*, this Court found no overriding federal reason to supersede state law in this area. 384 U.S. at 69. Where a state provides for transferability by written instrument, this Court found, the Mineral Leasing Act does not force federal supersession of state law. 384 U.S. at 69-70. A footnote in *Wallis* states that "the policies behind this law relate to the rights of private persons *vis-a-vis* the Secretary" of Interior. 384 U.S. at 69, n. 6.

The *Wallis* test has been followed in *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 31-32 (1977); *In Re:*

"Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D.N.Y. 1979), *rev'd*, 635 F.2d 987 (2d Cir. 1989), *cert. denied, Chapman v. Dow Chemical Co.*, 454 U.S. 1128 (1981); and other cases. The *Wallis* test may even be appropriate where the United States is a party, *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580, 603-04 (1973)("[S]tate law may be found an accceptable choice, possibly even when the United States itself is a contracting party.")

B. The Secretary Will Not Intervene In A Private Dispute Over An Assignment.

Federal officials will not determine the validity of an assignment of private interests under a federal oil and gas lease. As this Court pointed out in *Wallis*: "Where there is a private dispute as to the validity or effect of an assignment [under the Mineral Leasing Act of 1920], the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court." *Wallis*, 384 U.S. at 70, n. 8.

C. The Regulations Do Not Permit Intervention In a Private Dispute Over An Assignment.

The regulations implementing the Mineral Leasing Act support the *Wallis* view: "Transfers [of record title or of operating rights] are approved for *administrative purposes only*. Approval does not warrant or certify that either party to a transfer holds legal or equitable title to a lease." 43 C.F.R. § 3106.7-1 (1991)(Emphasis added).

D. The Federal Policy Was Followed By the Federal Agency In This Case.

The regulations and *Wallis* non-intervention doctrine were followed by the federal agency in this case. When the Bureau of Land Management wrote to the Norbeck

heirs in 1988 recognizing their interest in the lease registration, stamped on the BLM Form 3106 was the notation: "Approval does not warrant that either party to this transfer holds legal or equitable title to this lease."

Thus, under federal law, the Crawford Heirs' assignment, valid under state law, should have been left undisturbed. Instead, the Montana Supreme Court ignored *Wallis* and the regulations, and misapplied federal law to divest the Crawford Heirs of their property.

IV. THE MONTANA SUPREME COURT MISINTERPRETED AND MISAPPLIED THE EFFECT OF THE FEDERAL AGENCY'S ACTION.

The decision of the Montana Supreme Court is succinct and misguided. Following the reasoning of the 16th District Court, the Montana Supreme Court cited only the federal statute, 30 U.S.C. § 187a, and a single federal District Court case. *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F. Supp. 954 (W.D. Okla. 1952). The Montana Supreme Court distinguished one other federal case. *Gibbons v. Pan American Petroleum Corp.*, 262 F.2d 852 (10th Cir. 1958).

Then the Montana Supreme Court declared that "Mrs. Crawford failed to perfect the assignment *with the Department of Interior* pursuant to the language of the original lease and 30 U.S.C. § 187a." App. 5 (emphasis added). There was no discussion of rights under state law.

The Montana Supreme Court thereby ignored *Wallis*, federal policy, federal regulations, and its own prior decisions. The effect of the decision was to deprive Petitioners of their property under the imprimatur of federal law.

V. THE MONTANA SUPREME COURT'S INTERPRETATION SHOULD BE REVERSED.

The decision of the Montana Supreme Court, ignoring *Wallis* and important federal laws and policies, should not be left to confuse litigants and courts wrestling with private disputes about federal leases or rights. Otherwise, litigants would attempt to drag the federal government into every private dispute over assignments under the Mineral Leasing Act. The precedent overturning the settled federal policy in this area could also expand the confusion over federal policy to disputes over other federal statutes with anti-assignment clauses.

The effect of allowing the Montana Supreme Court's decision to stand would be to contravene federal policy in this area and to contradict important decisions of this Court and other federal courts. The Montana Supreme Court decision should be reversed.

CONCLUSION

This Court should issue a summary opinion in this case instructing the Montana Supreme Court to follow *Wallis*. In the alternative, this Court should grant a petition for certiorari to the Montana Supreme Court to allow a full review of these important points.

Respectfully Submitted,

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Counsel for Petitioners

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PETITIONERS,

v.

HEIRS OF GEORGE NORBECK: Jane S. Norbeck, Trustee of the JANE NORBECK Trust dated November 20, 1963,

RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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Counsel for Petitioners

No. 92-113

In The Supreme Court Of The State Of Montana

1992

JANE S. NORBECK, Trustee of the JANE NORBECK Trust dated November 20, 1963,

Plaintiff, Respondent and Cross-Appellant,

-vs.-

MRS. M.H. CRAWFORD and MR. M.H. CRAWFORD, her husband, if any, and other heirs, devisees, legatees, creditors, administrators, executors, and assigns of any of said defendants, if they be deceased; and any and all persons known or unknown, claiming or who might claim any right, title, estate or interest in or lien or encumbrance upon the real property situated in the County of Fallon, State of Montana, described as 25% of the net proceeds derived from the production as reserved by George Norbeck in operating agreement with Fidelity Gas Company included in and a part of U.S. Oil and Gas Lease prospecting permit, Billings Serial #021056 as to NE1/4, Section 12, Twp. 8N, Rge 59E of M.P.M., Fallon County, Montana or any thereof adverse to Plaintiff's title whether such claim be present or contingent including any claim or possible claim of dower, inchoate or accrued,

Defendants, Appellants, and Cross-Respondents.

APPEAL FROM: District Court of the Sixteenth Judicial District,

In and for the County of Fallon,

The Honorable Joe L. Hegel, Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Charles J. Peterson, Mackoff, Kellogg, Kirby &

Kloster, Beach, North Dakota

For Respondent:

Chris Mangen, Jr., Crowley, Haughey, Hanson, Toole

& Dietrich, Billings, Montana

Submitted on Briefs: July 23, 1992

Decided: August 25, 1992

Filed: August 25, 1992

2 Justice R.C. McDonough delivered the Opinion of the Court.

Mrs. M.H. Crawford, et al., appeals from a judgment of the Sixteenth Judicial District Court, Fallon County. We affirm.

The sole issue on appeal is:

Whether the District Court erred in granting the disputed 25 percent interest in a federal oil and gas lease to Jane S. Norbeck, Trustee of the Jane Norbeck Trust, subject however to 39/40ths of such 25 percent interest being vested in Mrs. M.H. Crawford, et al., upon approval of the Department of the Interior.

In 1934, George Norbeck (Norbeck) obtained federal lease, 021056(b), from the United States Department of Interior. The lease contained a fixed twenty-year term and granted the lessee right of renewal upon expiration. The lease also contained a provision barring assignment without consent of the Secretary of the Interior through the land office.

Norbeck entered into an operating agreement with Fidelity Gas Company. He retained record title ownership of the lease, as lessee, with 25 percent of the net proceeds of production. Norbeck appointed Fidelity Gas Company as his attorney-in-fact to obtain renewal leases on his behalf. Subsequently, Fidelity Gas Company assigned the operating rights in the deep formations to Shell Oil Company.

In 1935, Norbeck made an assignment of the 25 percent interest to Mrs. M.H. Crawford. This assignment was rejected by the United States Land Office because Mrs. Crawford did not pay the required

[3] lease bond, or establish the necessary qualifications to own an interest in the lease. Mrs. Crawford did not pay any delay rentals. After the assignment, Mrs. Crawford had the assignment filed with the county clerk and recorder. Thereafter, Mrs. Crawford took no action in regard to the lease.

Fidelity Gas applied for a renewal lease in 1954 on behalf of Mrs. Crawford. The land office rejected the renewal because Fidelity Gas did not have authority to act on behalf of Mrs. Crawford, and the land office did not recognize Mrs. Crawford as a lessee. Fidelity then applied for a renewal lease as attorney-in-fact for Norbeck. The land office accepted this application and issued a renewal to Norbeck. In 1964 Fidelity applied for the second renewal as attorney-in-fact for Norbeck, and the renewal was issued. The second renewal lease was put on producing status in 1968. Since then, some $420,000 in production payments have been allocated to the 25 percent interest.

On October 28, 1968, the land office notified "heirs of George Norbeck" that under federal regulations they had to establish their succession to his interest in the lease. On August 18, 1987, the Bureau of Land Management (BLM), the successor to the land office, notified the Norbeck heirs that it recognized their interest in the lease.

The Norbeck heirs transferred all of their interest in the lease to the Jane Norbeck Trust, Julius A. Bernard, Trustee. Subsequently, Jane S. Norbeck took over as trustee (Norbeck

[4] Trustee). On September 29, 1988, Shell Oil notified the trustee that Shell had completed its review of the claim to the interest but would not distribute the proceeds without a quiet title action being completed.

On October 22, 1990, the Norbeck Trustee began a quiet title action before the District Court. Efforts were made to locate Mrs. Crawford, but no response was forthcoming. A default was taken against Mrs. M.H. Crawford. The District Court quieted title to Jane S. Norbeck, Trustee, on December 7, 1990.

Subsequently, the heirs of Mrs. M.H. Crawford (the Crawford heirs) surfaced and filed a motion for relief from judgment. The District Court vacated the default and judgment on June 4,

1991. The Crawford heirs sought to quiet their title to 39/40ths of the disputed interest. Jane S. Norbeck, Trustee, filed a motion for summary judgment. In response, the Crawford heirs moved for partial summary judgment.

The District Court, on January 17, 1992, ruled that Jane S. Norbeck, Trustee, owned all the allocated production proceeds. However, the District Court ruled the Crawford heirs could apply to the BLM for approval of the previously rejected assignment. Should the assignment be approved, the Crawford heirs would own 39/40ths of the disputed interest and the proceeds of production would be allocated to them after the first day of the month following application for approval. This appeal followed.

§ Our scope of reviewing motions for summary judgment is the same as the trial court and is a question of law. Summary judgment is granted only if no genuine issue of material fact exists.

The District Court found that federal oil and gas leases are governed by the Mineral Leasing Act of 1920, P.L. No. 146, 41 Stat. 437 (1920), as codified in 30 U.S.C. Sec. 5, 181 et seq. The original statute provided: "[N]o lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior."

30 U.S.C. Sec. 187a (1990) provides:

[A]ny oil or gas lease issued under the authority of this Act may be assigned. . ., subject to final approval by the Secretary . . ., to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of qualification under the Act of the assignee or subleasee to take or hold such lease or interest therein . . . .

The District Court, in light of 30 U.S.C. 187a, ruled the Crawford heirs would own 39/40ths of the disputed interest upon the approval of the assignment by the BLM.

The case of Oasis Oil Co. v. Bell Oil & Gas Co. (W.D.

Okla. 1952), 106 F.Supp 954, followed 30 U.S.C. § 187a, and held that Oasis Oil Company (the assignor) was the sole record holder of the lease and was entitled to all of the oil runs from the well on the lease. *Oasis* at 957. In *Oasis*, the assignee, Fish, failed to pay the requested fee, and provided insufficient information to the

[6] Department of Interior which refused to approve the assignment. Thus, the assignment did not convey any interest in the lease under the statute until the date the Secretary of Interior approved the lease.

The Crawford heirs rely on Gibbons v. Pan American Petroleum Corporation (10th Cir. 1958), 262 F.2d 852, for the proposition that neither Norbeck nor his heirs were obligated under the lease after the assignment. However, this proposition is contrary to the facts before us. The Department of Interior viewed Norbeck as the record owner of the lease. The renewals were made and accepted in his name. A renewal submitted on behalf of Mrs. M.H. Crawford was rejected because the assignment had never been approved. Delay rentals became the responsibility of Norbeck, whether he paid them or not. In *Gibbons*, the Tenth Circuit stated that Gibbons's failure to submit the assignment for approval could not destroy the obligation of an assignee under the lease. *Gibbons* at 854. Thus *Gibbons* rests on the fact that Gibbons did *not* submit the assignment for approval. Here, Mrs. M.H. Crawford applied to the land office for approval of the assignment and it was rejected.

The material facts are not in dispute. Norbeck made an assignment to Mrs. Crawford, but she failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a. Later attempts were made to have Mrs. Crawford pay the rentals, but without success. As a result, the obligations under the lease remained with Norbeck.

[7] Neither the assignor nor assignee, or their heirs, acted relative to any rights they had until awakened by Shell Oil. The District Court ordered the existing proceeds of the 25 percent interest paid to the Norbeck heirs; however, by its order, it allowed the Crawford heirs the opportunity to perfect the assign-

ment by seeking approval of the Secretary of Interior under 30 U.S.C. § 187a.

Based on the evidence presented in the record, we agree with the determination of the District Court and affirm the District Court.

/s/ R.C. McDonough

Justice

We Concur:

/s/ J.A. Turnage

Chief Justice

/s/ John Conway Harrison

/s/ William E. Hunt Sr.

/s/ Karla M. Gray

/s/ Terry Trieweiler

/s/ Fred Weber

Justices

MONTANA SIXTEENTH JUDICIAL DISTRICT
COURT, FALLON COUNTY

No. DV 5436

JANE S. NORBECK, Trustee of the JANE S. NORBECK TRUST dated November 20, 1963,

Plaintiff,

vs

Mrs. M.H. CRAWFORD et al.,

Defendants.

MEMORANDUM AND ORDER

GRANTING SUMMARY JUDGMENT

Before the Court are the parties' cross-motions for Summary Judgment. This matter has been thoroughly briefed by both parties and this matter was argued orally on December 19, 1991. No record of the oral argument/hearing was made pursuant to stipulation of counsel. Defendant's counsel was granted an additional 10 days within which to submit a reply brief, due to Plaintiff's submission of a Reply Brief shortly before the hearing. The matter now being submitted, and based on the pleadings, affidavits and other documents on file, and for the reasons stated in the Memorandum below, the Court finds that there is no genuine issue of material fact and that summary judgment is appropriate.

MEMORANDUM

I. FACTS AND PROCEDURE:

The following facts appear to be established without any substantial controversy and are deemed to exist:

1. On October 10, 1934, the United States Department of the Interior issued to George S. Norbeck Federal Lease No. 021056(b) covering, among others, the following described lands in Fallon County, Montana:

Township 8 North, Range 59 East, M.P.M.

Section 12. NE1/4

The lease was issued for an initial 20-year term with a preemptive right to apply for renewal. The Lease contained provisions for delay rentals on non-producing lands. It also contained the Lessee's agreement not to assign any interest in the lease without consent by the Secretary of the Interior, acting through the General Land Office (now Bureau of Land Management - BLM).

2. The above-described federal lease was subject to an operating agreement between George Norbeck and Fidelity Gas Co., dated May 16, 1934. In the operating agreement, Mr. Norbeck appointed Fidelity Gas as his attorney-in-fact to obtain renewal leases on his behalf. Fidelity Gas later assigned the operating rights in the deep formations (below 2,000 feet) to Shell Oil Company.

3. On June 10, 1935, George S. Norbeck (and Jane M. Norbeck, his wife) assigned his interest in said lease to one M.H. Crawford (with respect to the land described above), presumably for a valuable consideration.

4. On May 1, 1936, M.H. Crawford (or someone on her behalf) caused the assignment to be recorded in the office of the Clerk and Recorder of Fallon County, Montana at p. 252 of Miscellaneous Book of Records.

5. Other than recording the assignment with the Clerk and Recorder, M.H. Crawford took no other action with respect to her interest in the lease.

6. Federal oil and gas leases are governed by the Mineral Leasing Act of 1920, Pub.L.No. 146, 41 Stat. 437 (1920), now codified at 30 U.S.C. Secs. 181 *et seq*. As originally enacted the provision regarding assignment of leases stated: [N]o lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. 30 U.S.C. Sec. 187. General Land Office Regulations required that the written consent of the Secretary of the Interior "be first had and obtained." This provision has been interpreted as meaning that the assignment did not convey any interest in the lease until the date the Secretary approved the lease. See *Oasis Oil Co. v. Bell Oil & Gas Co.* (D.C. 1952) 106 F.Supp. 954, 957. The statutory provisions now in effect regarding oil and gas leases

provide:

"[A]ny oil and gas lease issued under the authority of this Act may be assigned . . ., subject to final approval by the Secretary . . ., to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of qualification under the Act of the assignee or sublessee to take or hold such lease or interest therein" [emphasis supplied].

30 U.S.C. Sec. 187a (1990). Thus, while the Secretary's approval is still required, the effective date of the assignment could date back to the date a full and complete application was filed in the proper land office. A full and complete application would include the required bond and proof of qualifications of the assignee.

7. The subject lease contains the following language regarding assignments:

"SEC. 2. In consideration of the foregoing, the lessee hereby agrees:

"(k) *Assignment of lease.* — Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained."

Any assignment of the subject lease was necessarily subject to the restrictions on assignment contained in the language of the lease itself and subject to the restrictions contained in federal statutes and regulations.

8. On or about January 31, 1936, the General Land Office rejected the purported assignment from George Norbeck to Mrs. M.H. Crawford because she had not filed her affidavit of qualifications and she had not posted the required $5,000 lease bond.

9. Shortly before the expiration or the primary term of the lease, October of 1954, Fidelity Gas filed an application for renewal of the subject lease on behalf of Mrs. M.H. Crawford. The General Land Office rejected the application for two rea-

sons: (1) Fidelity Gas did not have authority to act for Mrs. Crawford (they had no power of attorney), and (2) the Land Office did not recognize Mrs. Crawford as the lessee because the assignment to her had been rejected.

10. Following the refusal of the Land Office to approve the renewal application on Mrs. Crawford's behalf, Fidelity Gas applied for a renewal lease on behalf of Mr. Norbeck by authority of its appointment as attorney-in-fact for Mr. Norbeck in the 1934 operating agreement. The Land Office accepted such application and issued its first renewal lease to George Norbeck, effective October 1, 1954.

11. Ten year later, when the first renewal lease was about to expire, Fidelity Gas applied for a second renewal lease as attorney-in-fact for George Norbeck. The Land Office accepted the application and issued the second renewal lease to Mr. Norbeck, effective October 1, 1964.

12. The second renewal lease was put on producing status in 1968, because of production from the Pennel Unit operated by Shell Oil. Since 1968, over $420,000 has been allocated to the disputed interest and withheld by Shell Oil. This does not include whatever amounts which previously had been escheated to the State of North Dakota prior to the Norbecks asserting their claim to the proceeds.

13. By letter, dated September 29, 1988, Shell Oil suggested to the heirs of George Norbeck that they quiet title to the subject lease so Shell Oil could pay out the funds it was holding on account for the owners of the subject lease.

14. In 1990, the heirs of George Norbeck filed the instant action requesting that title to the subject lease be quieted in them and that they be entitled to receive all proceeds of such lease then held in suspense by Shell Oil Company.

15. As neither Mrs. Crawford nor her heirs could be located, service was accomplished by publication. Applicable time periods passed without appearance of any adverse parties and the Clerk of Court duly entered the default of the defendants, and on December 7, 1990, the Court entered judgment quieting title to the subject lease in Plaintiffs.

16. Following the issuance of judgment quieting title, Shell Oil Company paid over to plaintiffs the sum of $421,660.15, representing the proceeds which had been allocated to the subject lease and held in suspense pending clarification of title.

17. Defendants made their first appearance in this case on April 19, 1991, 133 days following the entry of the default judgment against them. On June 4, 1991, this Court vacated the default judgment so that the matter could be resolved on the merits.

II. DISCUSSION:

The question before the Court is the effect of the 1935 assignment of an interest in a federal oil and gas lease on the rights of the parties in light of (1) the rejection and lack of approval by the Secretary of the United States Department of the Interior, and (2) the passage of time and apparent abandonment of the leasehold interest.

Plaintiffs claim, among other things, that since the Secretary of the Interior rejected the proposed assignment, that the assignment is null and void, cannot be enforced between the parties and cannot be resubmitted to the Secretary for approval. Plaintiffs claim Defendants' only recourse, following the rejection by the Secretary, would be an action for recision of the contract (assignment), and that such an action is barred by any imaginable statute of limitations. Therefore, the Plaintiffs claim all other questions are moot. Since the assignment is void, title has remained in Plaintiffs and all the Court needs to do is to declare that as a matter of law and quiet title in them. Plaintiffs claim further that it would be illegal (or at lease against public policy) for this Court to give effect to the assignment in the face of the rejection by the Secretary of the Interior.

Defendants, on the other hand, argue that the rejection by the Secretary is not determinative of the rights between the parties and that although a proposed assignment of a federal lease is rejected, the assignees can resubmit the lease for approval at any time regardless of the passage of time. Defendants also argue that they haven't reapplied because they need to clear up this challenge to their title first. They claim that Plaintiffs have

a continuing duty to protect and defend merchantable title in the Defendants under the warranty clause of the lease. Defendants have argued that this continuing duty includes a duty to apply for renewals of the lease, pay or at lease remain responsible for paying delay rentals and other obligations under the lease, and to actively seek the heirs of M.H. Crawford. In effect, Defendants argue that this duty continues indefinitely and that so long as they recorded their assignment, Defendants need do nothing further to perfect their interest in the lease. The defendants argue the assignment is enforceable regardless of its apparent abandonment and that all the court need do is quiet title in them, and then they will apply for the approval of the Secretary, some 57 years after the original assignment. Defendants have also stated they are entitled to the proceeds held in suspense by virtue of the assignment of the operating agreement under the lease. Finally, Defendants have filed counterclaims, essentially alleging Plaintiffs have breached their contract obligations under the lease, and in particular under the warranty provisions of the lease, by filing the instant lawsuit.

The Court concludes that neither Plaintiffs nor Defendants are totally correct.

First, the Court determines as a matter of law that the rejection of the assignment of federal lease in this case does not necessarily render the assignment void as between the parties. The assignment was rejected because M.H. Crawford failed to present the required proof of her qualifications and the required bond. Essentially, the assignment was rejected on procedural grounds. There is no evidence that the assignee, M.H. Crawford, was not qualified or that the assignment itself was in any way deficient. Nor has the Court been made aware of any federal statute, regulation or other policy which would prevent Defendants from resubmitting the assignment, only this time with the required proof and bond. Nor does it appear that the letter of rejection prohibits such a resubmittal.

However, this does not mean that the rejection of the assignment is without consequences. The public policy, as stated in 30 U.S.C., Sec. 187a, is that the assignment is not effective to transfer an interest until the Secretary approves the assignment. Until then, the assignor, in this case, the Norbecks, re-

main responsible to perform all obligations under the lease and arguably also remain entitled to receive the benefits under the lease. See *Oasis Oil Co. v. Bell Oil & Gas Co.*, (D. Okla. 1952). 106 F.Supp. 954, 957. Formerly, the effective date of an assignment was the actual date the assignment was approved or consented to by the Secretary of the Interior. The current version of Sec. 187a provides that upon approval by the Secretary an assignment becomes effective as of "... the first day of the lease month following the date of filing in the proper land office ..." Therefore, the Court concludes as a matter of law that, Plaintiffs are entitled to all proceeds attributable to the leasehold interest in question until the first day of the lease month following Defendants filing of a proper application for approval of the assignment as provided by federal law.

Subject to the approval of the Secretary of the Interior, Defendants will be entitled to a 39/40th interest in the subject leasehold interest and the proceeds attributable thereto following the effective date of the assignment. The 1/40th interest attributable to the heir who has not been joined as a party defendant shall be deemed forfeited to the Plaintiffs under the theory of laches set forth below. If the Defendants fail to file a proper application for approval of the subject lease, supported by the required proofs and bonds, within 180 days of the date of this order, the remaining 39/40th interest, shall be forfeited to the Plaintiffs under the theory of laches set forth below. If the Defendants ultimately fail to obtain approval of the assignment and the Secretary of the Interior, or his designate, clearly indicates that the lease is rejected on it merits and the Secretary will not entertain resubmission of such lease, then the remaining 39/40th interest, together with any accumulated proceeds, shall be forfeited to the Plaintiffs under the theory of laches set forth below as well.

As an alternative ground for finding Plaintiffs entitled to the proceeds attributable to the lease to date, the Court finds the Defendants' claims to the proceeds barred by the doctrine of laches. Laches is an equitable doctrine, the Montana Supreme Court has recently addressed in the case of *Richardson v. Richland County* (Mont. 1985), 711 P.2d 777, 782:

In *Matter of Estate of Wallace* (1980), 186 Mont. 18, 606

P.2d 136, this Court pointed out that there is no absolute rule as to what constitutes laches in Montana and that each case must be determined according to its own peculiar circumstance. The court emphasized that laches is not a mere matter of elapsed time, but is principally a question of the inequity of permitting a claim to be enforced.

> Laches ... is a concept of equity; it means negligence in the assertion of a right; it is the practical application of the maxim, "Equity aids only the vigilant"; and it exists when there has been unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable.

Wallace, 186 Mont. at 25, 606 P.2d at 140.

Sec. 1-3 218, MCA states: "The law helps the vigilant before those who sleep on their rights."

The Court then quoted from *O'Hanlon v. Ruby Gulch Min. Co.* (1922), 64 Mont. 318, 209 P. 1062, where the Court stated:

> While it is true that the statute of limitations had not run against the claim now asserted by plaintiffs, that fact alone does not determine their rights. The delay which will bar relief in equity is not necessarily measured by the period prescribed by the statute. It may be much less, depending upon the peculiar circumstances of the case, and in determining whether laches shall bar a particular claim it is proper to consider whether a party or an important witness has dies (sic), and the party against whom the claim is asserted has been deprived thereby of important testimony [citing case], or whether the property involved has increased in value [citing case], or whether the property has passed into the hands of an innocent third party [citing case], or whether the position of the parties is so changed otherwise that an injustice will follow a failure to apply the doctrine [citing case].

Barrett v. Zenisek, 132 Mont. at 239-40, 315 P.2d at 1007. In this particular case, the Court considers the following factors important in the application of the doctrine of laches:

A.Defendants abandoned the property back in the 1930s. The property was unproductive at the time. There were drilling restrictions in place and it was unlikely to become productive in

the near term. And, there is evidence that Mrs. Crawford not only did not pay delay rentals, but refused to pay delay rentals. See Letter of F. Millar Cloud, Attorney at Law, dated March 16, 1939--Exhibit "5" in Appendix of Exhibits to Brief in Support of Plaintiff's Rule 56 Motion for Summary Judgment. In addition, Mrs. Crawford did nothing to perfect her interest in the lease, i.e., obtain the consent of the Secretary of the Interior. She did not post the required bond, nor provide an affidavit as to her qualifications. Apparently, she did not consider that she owned the property as it was not included in any designation of her assets in probate or otherwise, and none of her heirs had any idea that she owned such a property.

B.From 1935 to present, the Defendants allowed the Plaintiffs to continue to be responsible for the obligations under the lease, including the obligation to pay delay rentals (whether actually paid or not), to obtain renewals of the lease, etc.

C.The Defendants have given no credible or satisfactory explanation of the reason for the delay in assuming the obligations as well as the benefits of the assignment of leasehold interest.

D.The property became productive in the late 1960s and became extremely valuable.

E.Defendants have allowed Shell to possess the oil and gas proceeds attributable to the leasehold interest until such time as Shell began escheating the same to the State of North Dakota.

F.Both principals are now deceased and no one has produced a living, contemporary witness who could testify regarding the transaction.

G.Plaintiffs did not begin this action to quiet title and lay claim to the proceeds until after Shell had indicated that they were escheating the proceeds to the State of North Dakota and Shell could not pay the proceeds to Plaintiffs in the absence of an appropriate court order.

H.The Defendants were not aware of any possible interest they might have and did not begin to participate in this case until after default judgment had been entered against them, and third-party title searchers located them, informed them of their

possible interest in exchange for a finder's fee.

I.Had Plaintiffs not instituted this action, there is no reason to believe the Defendants would have ever become involved and the proceeds would continue to escheat to the State of North Dakota.

Therefore, the Court determines that Defendants have forfeited any right to the accumulated proceeds by reason of laches. Since laches is an equitable remedy, the Court will not extend the relief to encompass actual title to the leasehold interest itself, since Plaintiffs themselves have delayed responding to the situation. Their active participation, over the years, although significant, has not been so substantial as to render it inequitable to allow the Defendants one last chance to enforce the assignment against them, at least as to the leasehold interest itself and future proceeds of the leasehold interest. Therefore, the Court will quiet title in the Defendants to the leasehold interest and proceeds to accrue as currently provided by 30 U.S.C. Sec. 187a, subject to the approval of the Secretary of the Interior. If, however, the Secretary fails to approve the assignment this time, the entire leasehold interest shall revert to the Plaintiffs and Defendants' rights shall be extinguished.

Finally, Defendants claim that even if they are not entitled to enforce the actual assignment of lease, they are entitled to enforce the terms of the operating agreement which was also assigned by the assignment in question. This claim must fail for the following, alternative reasons:

1.The lease refers to the operating agreement being assigned by separate instrument, but this Court has not been presented with any evidence that such assignment was actually made and recorded. The assignment of lease does not by its own terms effect the assignment of the operating agreement. Therefore, there is no evidence before the Court to support such an argument. The fact that Fidelity Gas Company did not have a power of attorney from Mrs. Crawford is additional evidence that the assignment of the operating agreement was never effected. Therefore, although Defendants have certain equitable rights under the assignment of lease, they do not have any additional legal rights under the operating agreement itself.

2.Even if the assignment of operating agreement did exist or even if the assignment of lease was interpreted so as to effect such an assignment, to the extent such an operating agreement purported to effect an assignment of rights under the lease in question, it would be subject to all valid federal rules and regulations restricting transfer as well as all restrictions contained in the lease itself. To hold otherwise would allow persons to easily end-run the transfer restrictions and thereby violate the public policy expressed in the laws containing such restrictions.

III. COUNTERCLAIMS

Defendants have filed counterclaims against the plaintiffs all alleging that the plaintiffs have, by the act of filing this action for quiet title, breached their obligations under the warranty clause of the assignment and otherwise committed a fraud upon the Court. Except for Count I regarding quiet title to the leasehold interest, Defendants' claims must fail for the reasons set forth below.

A. QUIET TITLE:

As stated above, Defendants will be given one more reasonable opportunity to obtain the consent of the Secretary of the Interior to the assignment of lease. If successful, title will be quieted in Defendants to the leasehold interest and the proceeds thereof effective as of the date provided by 30 U.S.C. Sec. 187a. If unsuccessful, title will be quieted in the Plaintiffs. Please refer to the discussion of the application of the doctrine of laches and the application of federal law above.

B. BREACH OF WARRANTY AND OTHER CLAIMS:

Defendants' claim for breach of warranty must fail for the following reasons:

1.The failure in Defendants' title did not arise out of any action by the Plaintiffs, but out of Defendants' own inaction.

2.Defendants breached the terms of the contract (assignment) first, by not assuming and holding Plaintiffs harmless from the obligations imposed under the lease. One who first breaches a contract cannot complain of a subsequent breach by the other party. It would be unreasonable to expect the Plain-

tiffs to shoulder the burden of the leasehold obligations indefinitely (in this case for 56 years to date) and still be held to defend title on behalf of the breaching party.

3.Defendants have not shown a probability of damages. Had the Plaintiffs not filed this action, all the evidence indicates Defendants never would have known about their possible claim and the proceeds would have continued to escheat to the State of North Dakota.

4.Plaintiffs have made out a good claim for laches on the party of the Defendants. Therefore, they have not wrongfully laid claim to that which was not theirs. They have not committed conversion.

5.Plaintiffs have not committed fraud because:

a.Plaintiffs proceeded only after Shell Oil Company could not find M.H. Crawford or her heirs and was escheating the proceeds to the State of North Dakota. Plaintiffs did not lay any claim to the proceeds prior to that time even though they knew of a possible claim as early as 1969. They only made a claim after it appeared that no one else was going to lay claim to the property in question.

b.This Court recollects Mr. Culver advising the Court of the existence of the rejected assignment prior to entry of the decree quieting title. Therefore, the Court was not mislead. Rather than showing a fraudulent intent, the facts of this case merely illustrate the confusion which can occur when you have two chains of title: one state and one federal. The Court does not consider that it was mislead in any material way with respect to the prosecution of this action.

c.Defendants are not entitled to specific performance of a contact that they themselves have first breached. They waited an unreasonable length of time to assume their obligations and assert their rights to this kind of relief under the contract. 27-1-416, MCA. In any event, this Court's ruling on then quiet title claims should be sufficient to convey the interest to Defendants to which they are entitled.

d.Defendants are not entitled to delivery of the personal property for the reasons stated above, and, in particular, because

to the extent they did not assume the burdens of the lease, they are not entitled to its benefits.

IV. ORDER:

THEREFORE, IT IS ORDERED:

A.Summary Judgment is granted to Plaintiffs to the extent stated above and in favor of Defendants as to the remainder.

B.Plaintiffs' counsel shall prepare a Judgment in accordance with the foregoing Memorandum and shall mail it to the Judge and serve the same on opposing counsel. Counsel will have 5 working days within which to object to the form of the judgment.

C.Each party shall pay their own costs and counsel fees.

D.The Clerk of Court shall mail a copy of this document to counsel of record and any unrepresented parties.

DATED: January 17, 1992

(COURT SEAL)/s/ JOE L. HEGEL, District Judge

CC: Russell L. Culver; Chris Mangen, Jr.; Charles J. Peterson; Honorable Joe L. Hegel

NOTE: Stamped "Jan. 21, 1992" Carol Wade

Clerk of the Court"

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that we, George Norbeck and Jane M. Norbeck, husband and wife, of Redfield, South Dakota, in consideration of One Dollar ($1.00) and other considerations of value, in hand paid, do hereby sell, assign, transfer and set over to Mrs. M.H. Crawford, of Santa Ana, California, hereinafter referred to as Assignee, NE1/4 Section 12, Twp. 8 N. Range 59 E.M.P.M. Fallon County, Montana, included in and a part of United States oil and gas prospecting permit, Billings Serial 021056 (consolidated), dated December 5, 1927; assigning hereby also such United States oil and gas lease or leases as may have been or may be issued to the undersigned George Norbeck pursuant to the terms of the aforesaid oil and gas prospecting permit and application for lease, which has been made and filed with the Secretary of the Interior, the rentals thereon paid, and which has been approved by the Secretary of the Interior.

This assignment is made subject to royalties reserved unto the original permittee and/or his assigns, amounting to Seven and one-half (7-1/2%) per centum on the Class A acreage, and Two and one-half (2-1/2%) per centum on the Class B acreage; and to the royalties reserved to the United States; (and to a royalty of Seven and one-half (7-1/2%) per centum on all gas produced and saved from sands lying and being within said premises at a depth of two thousand (2000) feet or less, assigned to the Atlantic Pacific Oil Company of Montana). This assignment is also made subject to the hereinafter designated and mentioned contracts (insofar as applicable to NE1/4 Sec. 12) heretofore made by the said George Norbeck and Jane M. Norbeck, if her signature was required, all of which said contracts, are, by separate instruments, assigned to the assignee above named in this assignment, and which said contracts are:

1.Operating Agreement between George Norbeck and Fidelity Gas Company, dated May 4, 1934;

The said George Norbeck and Jane M. Norbeck shall, and will, and by these presents do warrant and defend the title to

said aforementioned property unto said assignee, his heirs and assigns fully, and they do further warranty and fully guarantee their right to convey the same, free and clear of liens and encumbrances. The said George Norbeck and Jane M. Norbeck to further covenant and agree to and with said assignee that they will execute and deliver to said assignee, his heirs and assigns, any further assignment or assignments requested by said assignee, if by said assignee deemed necessary to complete or perfect this assignment and transfer of any contractual rights to aforementioned property, or any right or interest therein, held by said George Norbeck and Jane M. Norbeck, or either of them. The said George Norbeck and Jane M. Norbeck do further represent and warrant that all rentals due to the United States of America, on said property, and all royalties reserved or held thereon, have been paid to December 1, 1934; and they further stipulate and agree that they will pay such royalties and rentals to date hereof, (assignee assuming the payment of rentals and royalties from said date).

This assignment effective as of June 10, 1935.

Dated at Billings, State of Montana on this 10th day of June, A.D. 1935

/s/George Norbeck

/s/Jane M. Norbeck

(Notary)

30 U.S.C. § 187a. Oil or gas leases; partial assignments

Notwithstanding anything to the contrary in section 187 of this title, any oil or gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this chapter, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this chapter of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however,* That the Secretary may, in his discretion, disapprove an assignment of any of the following, unless the assignment constitutes the entire lease or is demonstrated to further the development of oil and gas:

(1) A separate zone or deposit under any lease.

(2) A part of a legal subdivision.

(3) Less than 640 acres outside Alaska or of less than 2,560 acres within Alaska.

Requests for approval of assignment or sublease shall be processed promptly by the Secretary. Except where the assignment or sublease is not in accordance with applicable law, the approval shall be given within 60 days of the date of receipt by the Secretary of a request for such approval. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding.

Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of any provision of this chapter. Upon the segregation by an assignment of a lease issued after September 2, 1960 and held beyond its primary term by production, actual or suspended, or the payment of compensatory royalty, the segregated lease of an undeveloped, assigned, or retained part shall continue for two years, and so long thereafter as oil or gas is produced in paying quantities.

Mineral Leasing Act of February 25, 1920

(41 Stat. 437)

SEC. 30. That no lease issued under the authority of this act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of Secretary of the Interior, be permitted at any time to make written relinquishment of all rights, under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included with the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of 16 or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the

workmen complete freedom of purchase; provision requiring the payment of wages a least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: ***Provided***, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

Section 31 of the Mineral Leasing Act of February 25, 1920. (41 Stat. 437).

Sec. 31. That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.

§ 3106.7 Approval of transfer.

§ 3106.7-1 Failure to qualify.

No transfer of record title or of operating rights (sublease) shall be approved if the transferee or any other parties in interest are not qualified to hold the transferred interest(s), or if the bond, should one be required, is insufficient. Transfers are approved for administrative purposes only. Approval does not warrant or certify that either party to a transfer holds legal or equitable title to a lease.

Department of Interior Oil and Gas Regulations (1920), Paragraph 12-1/2.

ASSIGNMENT OF PERMITS. – Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable.

Supreme Court, U.S.
FILED
DEC 18 1992
OFFICE OF THE CLERK

No. 92-875

In The

Supreme Court of the United States

October Term, 1992

DIANE E. HONEYCUTT, ET AL.,

Petitioners,

v.

JANE S. NORBECK, TRUSTEE OF THE JANE NORBECK TRUST DATED NOVEMBER 20, 1963,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Can an assignment of a federal oil and gas lease that was rejected by the Secretary of the Interior in 1936 now be enforced by the assignee under state law?

2. Did the Montana Supreme Court decision, refusing to enforce an assignment rejected by the Secretary, rest on adequate and independent state grounds?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

ADDITIONAL STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 12

REASONS FOR DENYING THE WRIT 13

THE REJECTED ASSIGNMENT IS INVALID UNDER FEDERAL LAW 13

THE PETITIONERS' "NON-ENTANGLEMENT" THEORY DOES NOT APPLY TO THE MINERAL LEASING ACT 19

THE ONLY FEDERAL CASE THAT HAS EVER CONSIDERED THE EFFECT OF A REJECTED ASSIGNMENT HAS HELD THAT THE ASSIGNMENT IS NOT EFFECTIVE TO CONVEY ANY INTEREST TO THE ASSIGNEE 20

THE PETITIONERS HAVE NO CLAIM TO THE RENEWAL LEASES 22

THE DECISIONS OF THE MONTANA COURTS REST ON THE INDEPENDENT STATE LAW GROUND OF LACHES 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Aronow v. Bishop, 107 Mont. 317, 86 P.2d 644 (1939) 21

Boesche v. Udall, 373 U.S. 474 (1963) 14, 19

California Coastal Comm'n. v. Granite Rock, 480 U.S. 572 (1987) 17

Gibbons v. Pan American Petroleum Corp., 262 F.2d 852 (10th Cir. 1958) 28

Herigstad v. Hardrock Oil Co., 101 Mont. 22, 52 P.2d 171 (1935) 21

Isaacs v. DeHon, 11 F.2d 943 (9th Cir. 1926) 21, 22

Johnson v. Estate of Shelton, 232 Mont. 85, 754 P.2d 828 (1988) 24

Kleppe v. New Mexico, 426 U.S. 529 (1976) 17

Martin v. National Security Co., 300 U.S. 588 (1937) 19

McKenzie v. Irving Trust Co., 323 U.S. 365 (1945) 19

Norbeck v. Crawford, ___ Mont. ___, 836 P.2d 1231 (1992) ..... *passim*

Oasis Oil Co. v. Bell Oil & Gas Co., 106 F.Supp. 954 (W.D. Okla. 1952) 11, 20, 21

United States v. California, 332 U.S. 19 (1947) 17

United States v. San Francisco, 310 U.S. 16 (1940) 17

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Mineral Leasing Act of February 25, 1920 (41 Stat. 437) ..... *passim*

30 U.S.C. § 181 13

30 U.S.C. § 187 (41 Stat. 449) ..... *passim*

Montana Code Annotated § 1-3-218 27

Montana Code Annotated § 28-10-601 27

Montana Code Annotated § 28-10-602(1) 27

Montana Code Annotated § 75-10-701(8)(a) 27

Montana Code Annotated § 75-10-715(1)(a) 27

Article IV, Section 3, Clause 2 of the United States Constitution 17

Law of Federal Oil and Gas Leases, Vol. 1, § 10.02[3] 25

OPINIONS BELOW

The Montana Supreme Court's decision in this case is now reported as *Norbeck v. Crawford*, ___ Mont. ___, 836 P.2d 1231 (1992).

ADDITIONAL STATUTE INVOLVED

In addition to the statutes set forth in the Petition for Writ of Certiorari, the following statute is also involved in this case:

> 30 U.S.C. § 187. Assignment or subletting of leases; relinquishment of rights under leases; conditions in leases for protection of diverse interests in operation of mines, wells, etc.; State laws not impaired (41 Stat. 449).
>
> No lease issued under the authority of this chapter shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the work day to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any child under the age of 16 in any mine below the

surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. None of such provisions shall be in conflict with the laws of the State in which the leased property is situated.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case is littered with inaccuracies, omissions, and misstatements.

Federal oil and gas lease Billings 021056(b) was issued by the United States to George Norbeck on October 10, 1934. The lease covered the NE¼ of Section 12, Township 8 North, Range 59 East, Fallon County, Montana (the "subject lands"), and other lands. All of the lands in the lease are owned by the United States. Lease 021056(b) was one of two leases that grew out of federal prospecting permit Billings 021056.

The lease stated that it was granted "for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive periods of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods."

In the lease the lessee agreed "[t]o furnish a bond with approved corporate surety in the penal sum of $5,000, conditioned upon compliance with the terms of

the lease." The lessee also agreed "[n]ot to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with consent in writing of the Secretary of the Interior first had and obtained."

In May of 1934, George Norbeck entered into an operating agreement, subleasing his interest in the subject lands and permit 021056 to Fidelity Gas Co. In the agreement, Mr. Norbeck reserved "[t]wenty-five percent (25%) of the net proceeds" of all production from or attributed to the subject lands, after deducting outstanding royalties.

Also in the agreement, Mr. Norbeck appointed the secretary of Fidelity Gas as his "true and lawful attorney-in-fact to . . . perform all acts necessary to maintain [his] titles to [his] lands [as] described; and particularly to make, execute and sign for and on behalf of [him], and in [his] name . . . , any and all petitions to the Department of the Interior in connection with . . . seeking relief of any kind on any petition to the Department in connection with such permit or lease, [and] ratifying all that such attorney may do in the premises."

After the operating agreement was approved by the Secretary of the Interior, Mr. Norbeck retained the "record title interest" in the lease, as the lessee of record with the General Land Office of the Department of the Interior. This fact, which was omitted by the Petitioners, is important because under Lease 021056(b), only the record title lessee was entitled to renew the lease at the end of its twenty-year term.

The General Land Office was the predecessor to the modern day Bureau of Land Management (BLM) of the Department of the Interior, the administrative agency in charge of federal oil and gas leasing, headed by the Secretary of the Interior. However, the General Land Office was, like the BLM now, responsible for more than merely recording or registering federal leases. This characterization of the Land Office on p. 4 of the Petition is inaccurate and misleading. The terms "recording" and

"registration" are completely foreign to the Mineral Leasing Act (A. 22-23) and the Department of the Interior regulations. The Mineral Leasing Act and regulations clearly provide that assignments are filed with the BLM, formerly the General Land Office, for approval by the Secretary, not merely for registration or recording.

By assignment dated June 20, 1935 (A. 20-21), George Norbeck attempted to transfer to Mrs. M. H. Crawford his record title interest as lessee of the subject lands under permit 021056 and any lease issued pursuant to the permit. The assignment was made subject to the 1934 operating agreement with Fidelity Gas.

Contrary to the statement on p. 4 of the Petition, Mr. Norbeck did not agree in the assignment to undertake all necessary renewals and other applications until the assignment was recorded by the Department of the Interior. What the assignment (A. 21) actually says is this:

> The said George Norbeck and Jane M. Norbeck do further represent and warrant that all rentals due to the United States of America, on said property, and all royalties reserved or held thereon, have been paid to December 1, 1934; and they further stipulate and agree that they will pay such royalties and rentals to date hereof, (assignee assuming the payment of rentals and royalties from said date).

The assignment was filed for approval with the Federal Land Office in Billings, Montana on August 6, 1935. By decision dated January 31, 1936, the Department of the Interior, General Land Office, in Washington, D.C., "rejected" the assignment to Mrs. Crawford, because she did not submit affidavits showing her qualifications to hold interests in federal leases, nor did she provide the required $5,000 lease bond. The Land Office decision pointed out that "the approval of an assignment by the Secretary of the Interior is discretionary [and] [s]uch approval when given, records transfers of title and approves qualifications of assignees, since it is with the legal title holder or transferee that the Government deals

as lessee." The Land Office rejection of the assignment has never been appealed, and neither the Secretary nor any agency within the Department has ever approved the assignment.

Page 4 of the Petition tries to make it sound like it was Mr. Norbeck's attorney's fault that the Land Office rejected the assignment. That is not so. No one knows who the attorney represented, if anyone, in filing the assignments with the Land Office, but it has never been established that he was the attorney for Mr. Norbeck, nor was any such fact ever found by the State Courts below, nor was any such issue even raised or alleged by the Petitioners in the State Courts. The facts of this case have been difficult to reconstruct because of the long passage of time, but it appears that the Petitioners are content to make them up to suit their purposes.

The Petitioners argue on p. 12 of the Petition that there is no evidence whether Mrs. Crawford knew the assignment had been rejected. However, there is a March 16, 1939 letter in the BLM file (which was part of the record before the State Courts) from F. Millar Cloud to the Commissioner of the General Land Office complaining about Crawford's refusal to pay the annual rentals on the lease, and pointing out that the rentals had actually been paid by the owners of Lease 021056(a), the other lease that grew out of the original prospecting permit. The owners of the "(a)" lease were afraid that if they did not pay rentals on the "(b)" lease, both would be terminated by the General Land Office. Cloud's letter states in part:

> Many attempts have been made to persuade Mr. Crawford to contribute or pay the annual rental to the United States with respect to the lands outside of the Unit and apparently having no value insofar as oil or gas is concerned. All efforts have been met without success. Those people in group "A" for several years last past have paid such rental or caused the same to be paid to the United States of America under the

> belief that it was necessary to do so in order to keep the lease in good standing.
>
> * * *
>
> I have been advised that Mr. Crawford refuses to take any step in the matter. The land appears to be non-productive insofar as oil or gas is concerned which appears to be borne out by the fact that it was left out of the Unit. It is apparently the attitude of Mr. Crawford that some day something might happen and in the meantime he feels elated that he is for no cost obtaining a "free ride."

The Land Office responded in a letter later that month telling Mr. Cloud that the assignment to Mrs. Crawford had never been approved by the Department of the Interior, and that "[a]ccording to the record, until the assignment to Mrs. Crawford is approved by the Department, George M. Norbeck, present title holder of the NE 1/4 Sec. 12-8-59, which is outside the Unit plan, is responsible for the payment of the annual rental."

By an agreement in 1951, Fidelity Gas subleased to Shell Oil Company all of the operating rights in the "deep formations" below a depth of 2,000 feet in the NE1/4 of Section 12 and other lands. The Land Office approved the agreement in 1954.

At the end of the twenty-year term of Lease 021056(b), Fidelity Gas filed an application for a renewal lease with the General Land Office. The application was signed by the secretary of Fidelity Gas as the attorney-in-fact for Mrs. Crawford.

By decision dated March 29, 1955, the Land Office rejected the renewal application filed on behalf of Mrs. Crawford because "[a]uthority of the attorney-in-fact to sign the application for Mrs. Crawford was not submitted," and because "the assignment to Mrs. Crawford [had been] rejected for the reason that she did not furnish a showing as to her qualifications nor the required $5,000 lease bond." The Land Office decision went on to say:

> Inasmuch as an assignment of Lease 021056(b) to Mrs. Crawford has not been approved, she has never been recognized as the record title owner of this lease. Therefore, her application for renewal is hereby rejected subject to the right of appeal within thirty days from receipt of this decision.
>
> If no appeal is filed within the time allowed, George Norbeck, who is still the record title owner of Lease 021056(b), will be given an opportunity to file an application for renewal of the lease.

Contrary to the statement on p. 12 of the Petition, Fidelity Gas did not treat the rejected assignment as valid between the parties. After the renewal application on behalf of Mrs. Crawford had been rejected, Fidelity Gas filed another application, but this time as the attorney-in-fact for George Norbeck under its appointment in the 1934 operating agreement. All of Fidelity Gas Co.'s activities were on behalf and in the name of George Norbeck, as his attorney-in-fact.

The Norbeck renewal application stated that "Applicant purports to be the record title owner of said lease insofar as it covers [the subject lands], . . . ; that in connection with the renewal of said lease, Applicant has a preferential right to renew the same for a term of ten (10) years and does hereby assert such preferential right over all others."

The Land Office accepted the authority of Fidelity Gas to act on behalf of Mr. Norbeck, and transmitted the renewal lease forms to Fidelity Gas for execution. Later, the Land Office approved a ten-year renewal lease to George Norbeck.

The first renewal lease was issued to George Norbeck effective October 1, 1954. The lease was granted "with preferential right in lessee to renew this lease for successive periods of 10 years, upon such reasonable terms and conditions as may be prescribed by lessor, unless otherwise provided by law at expiration of such periods."

Ten years later, Fidelity Gas filed an application for another renewal lease as the attorney-in-fact for George Norbeck. The 1964 application contained the same statements as the 1954 application. The BLM issued the second renewal lease to George Norbeck effective October 1, 1964. Four years later, the subject lands were committed to the Pennel Unit Agreement.

George Norbeck died intestate in 1938. His estate was never probated. In the late 1940's, steps were taken to have his interests transferred into the name of his widow, Jane M. Norbeck, and affidavits of heirship for Mr. Norbeck were filed with the Land Office.

After Mr. Norbeck's widow passed away, his successors were contacted by Shell Oil Company. In a letter dated April 9, 1968, Shell also asked them to submit affidavits of heirship for George and Jane Norbeck, along with ratifications and consents to the Pennel Unit Agreement, which they did. Shell had to get their consents to the unit agreement, as required by federal regulations, because George Norbeck was still the lessee of Lease 021056(b) as shown on the Land Office records. The statement on p. 4 of the Petition, that Mr. Norbeck's successors took no further actions in connection with the lease after he passed away, is simply untrue.

Shell Oil formed the Pennel Unit in 1968. The subject lands were included as Unit Tract No. 1. Since then, more than $420,000.00 in proceeds of production from the unit have been allocated to the 25% net proceeds interest reserved by Mr. Norbeck in his operating agreement with Fidelity Gas. Shell held these monies for the legal owner, except for certain amounts that were escheated to the State of North Dakota. Contrary to the statements on pp. 5, 6, 12-13 of the Petition, it is not a fact nor did the State Courts below find that Shell Oil paid the production proceeds into a suspense account "titled" for Mrs. Crawford, nor is it true that Shell recognized the assignment to Mrs. Crawford as being valid. Shell had no power or authority to decide title. Contrary to the statement on p.

12 of the Petition, the State of North Dakota did not treat the rejected assignment as valid. There are no such facts in the record, nor were any such facts alleged or found by the State Courts as to how the production proceeds came to be escheated to the State of North Dakota, nor how they were held afterwards.

By Notice to the "Heirs of George Norbeck" dated October 28, 1968, the Land Office informed the Norbeck heirs that "[t]he lease file of producing oil and gas lease BILLINGS 021056(b) shows that George Norbeck is the lessee of record title interest in and to the [subject lands];" that under the federal regulations they had to establish their succession to his interests in the lease; and that "[e]ach of the heirs to these interests must submit an originally executed statement as to his or her qualifications, interests and holding in Federal oil and gas leases in the State of Montana."

By decision dated August 18, 1987, the BLM recognized that "[t]he evidence [which had been] submitted is sufficient to establish Helen N. Bernard, Collette M. Norbeck, Virginia Norbeck and Sterling M. Norbeck as the ultimate successors-in-interest to the Estate of George Norbeck [and that] this office recognizes the interests formerly held by the Estate of George Norbeck are now held in the above-named heirs in oil and gas lease MTBIL 021056(B)." Contrary to the statement on p. 5 of the Petition, the Norbeck heirs were clearly not "dormant" with respect to Lease 021056(b), and certainly not as dormant as Mrs. Crawford and her successors, who could not even be found.

The Norbeck heirs subsequently transferred all of their interests in Lease 021056(b) to the Jane M. Norbeck Trust, Julius A. Bernard, Trustee. The assignment to the Trustee was approved by the BLM effective on August 1, 1987. The BLM later recognized Jane S. Norbeck as the successor trustee by notice dated September 21, 1988.

By letter dated September 29, 1988, Shell Oil notified the successor trustee that Shell had reviewed her title to

the net proceeds interest reserved by George Norbeck in the operating agreement with Fidelity Gas. However, Shell, for its own protection, was unwilling to disburse the allocated proceeds without a quiet title action.

Jane S. Norbeck, Trustee of the Jane M. Norbeck Trust, brought this action in the Montana Sixteenth Judicial Court for Fallon County to quiet her title. The named defendants were all of the successors to Mrs. M. H. Crawford. None of the defendants answered, and their default was taken. The State District Court entered its quiet title decree in favor of the Trustee on December 7, 1990.

On April 19, 1991, some of the defendants filed a motion for relief from judgment. These defendants, the Petitioners here, claimed to be all but one of Mrs. Crawford's heirs, and the successors to 39/40ths of her ownership. The other heir, Dorothy Mulliken, successor to 1/40th of Mrs. Crawford's ownership, has never appeared in this action. On June 4, 1991, the District Court vacated the default judgment "to allow the case to be decided on its merits."

It is undisputed that the Petitioners did not know anything about the ownership claims they are making until they were contacted by a professional title searcher, International Searchers, Inc. In their contracts with International Searchers, the Petitioners admitted that they were "unaware of the existence" of the monies held by Shell, and had "no prior knowledge" of any claim to the disputed interest. In their contracts, they appointed International Searchers as their exclusive agent to pursue their claims. International Searchers is paying for all of their court costs, legal fees and expenses, in return for half of any monies they recover.

After the default judgment was lifted, the Petitioners filed their Answer and Counterclaim, essentially denying the Trustee's ownership, and seeking to quiet their title to 39/40ths of the disputed interest.

On January 17, 1992, the District Court issued its Memorandum and Order Granting Summary Judgment (A. 7-19). The District Court ruled that all of the production proceeds allocated to the disputed interest to date are owned by the Trustee, but the Court gave the Petitioners the opportunity to apply to the BLM for approval of the rejected assignment. Under the District Court's ruling, should the BLM approve the assignment, the Petitioners would own 39/40ths of the production allocated to the disputed interest going forward after the first day of the month following the filing of their application (A. 13). The District Court based its decision on 30 U.S.C. § 187a of the Mineral Leasing Act, and *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F.Supp. 954 (W.D. Okla. 1952). However, the Court also found that the Petitioners' claims to the existing proceeds are barred by laches, an equitable doctrine under Montana law (A. 13-16).

On appeal, the Montana Supreme Court unanimously affirmed the District Court's decision with this:

> The material facts are not in dispute. Norbeck made an assignment to Mrs. Crawford but she failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a. Later attempts were made to have Mrs. Crawford pay the rentals but without success. As a result the obligations under the lease remained with Norbeck. Neither the assignor nor assignee, nor their heirs, acted relative to any rights they had until awakened by Shell Oil. The District Court ordered the existing proceeds of the 25% interest paid to the Norbeck heirs, however by its order it allowed the Crawford heirs the opportunity to perfect the assignment by seeking approval of the Secretary of Interior under 30 U.S.C. § 187a.
>
> Based on the evidence presented in the record, we agree with the determination of the District Court and affirm the District Court.

Norbeck v. Crawford, ___ Mont. ___, ___, 836 P.2d 1231, 1234 (1992) (A. 5-6).

SUMMARY OF ARGUMENT

The Montana Courts properly applied the Mineral Leasing Act and state law to determine the legal effect of the rejected assignment, and to assess the equities between the parties, in deciding ownership of the disputed interest. The Petitioners' claims under the rejected assignment are contrary to the express provisions of the Mineral Leasing Act, which require that assignments of federal leases be approved by the Secretary. To the extent there is any federal question in this case, the Montana Courts decided it correctly. An assignment of a federal lease that has been rejected by the Secretary cannot be enforced by the assignee under state law. Such a rule would obliterate the Mineral Leasing Act requirement that lease assignments be approved by the Secretary, as well as the federal policy inherent in that requirement.

The State Courts also held that the Petitioners' claims are barred by laches, an equitable state law doctrine, because the rejected assignment was not effective to relieve Mr. Norbeck and his successors of their contractual responsibilities to the United States under the lease. Laches is an independent state law ground for the rulings by the Montana Courts.

The reasons presented by the Petitioners for issuing the writ have no merit. The State Court decisions below do not conflict with any decision of this Court, nor any decision of a United States court of appeal. It is the Petitioners' argument – that the Montana Courts should have applied state law to enforce the rejected assignment – that conflicts with the federal policy in the Mineral Leasing Act. Their argument also ignores the holdings by

the State Courts that the Petitioner's claims are barred by laches under state law. The Petition should be denied.

REASONS FOR DENYING THE WRIT

THE REJECTED ASSIGNMENT IS INVALID UNDER FEDERAL LAW

The Petitioners apparently claim that the Montana Courts erred by not enforcing the rejected assignment under state law. Their argument is that the Secretary's rejection of the assignment is meaningless, and that the State Courts should not have considered the Mineral Leasing Act to determine the legal effect of the rejected assignment, nor to assess the equities between the parties. The Petitioners argue that the federal policy under the Mineral Leasing Act and this Court's decision in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), is that state law controls the legal effect of a federal lease assignment, as between the assignor and the assignee, regardless of whether the assignment has been rejected by the Secretary. They are wrong.

Contrary to the statement on p. 8 of the Petition, the issue in this case is not whether the rejected assignment was nullified by the Department's refusal to "register" it. The Department of the Interior does not "register" assignments, and never has. Assignments are filed with the Department so they can be approved by the Secretary, as required by the Mineral Leasing Act.

Federal oil and gas leases are governed by the Mineral Leasing Act of February 25, 1920 (41 Stat. 437). The current Act is codified in 30 U.S.C. § 181 et seq. (1990). Section 30 of the original Act (A. 23-24) stated that "[n]o lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." These provisions are still part of the current Act at 30 U.S.C. § 187 (1990). The obvious purpose of these provisions is to ensure that lessees holding

interests in federal leases are properly qualified, accountable to the United States, and responsible for their actions on federal leases.

Section 13 of the 1920 Act gave the Secretary authority to issue two-year prospecting permits, granting the permittee the right to prospect for oil and gas in the lands covered by the permit. Section 14 provided that upon discovery of oil and gas, the permittee was entitled to a lease on one-fourth of the lands in the permit. The permittee also had a preference right to a lease on the remaining lands. Under Section 17 of the 1920 Act, both of these leases were issued for a term of twenty years, with the "preferential right" in the lessee to renew for successive periods of ten years upon such reasonable terms and conditions as the Secretary prescribed. Lease 021056(b) was the "preference right" lease that grew out of prospecting permit Billings 021056.

Before 1946, paragraph 12½ of the Department of the Interior regulations (A. 25) stated:

> ASSIGNMENTS OF PERMITS Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior.

Paragraph 17 of the regulations also set out the prescribed federal oil and gas lease form. Section 2(l) of the form provided for the lessee's agreement:

> Not to assign this lease or any interest therein, nor sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

Lease 021056(b) had exactly the same provision.

Federal oil and gas leases have always been subject to many restrictions and on-going supervision by the Secretary of the Interior. As this Court said in *Boesche v. Udall*, 373 U.S. 474, 477-478 (1963):

> Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United

> States the fee interest in the leased lands, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary. Thus, assignments and subleases must be approved by the Secretary. 30 U.S.C. § 187 . . . .

When the Land Office rejected the assignment to Mrs. Crawford, the Mineral Leasing Act, the Department regulations, and Lease 021056(b) itself, all stated that assignments were not allowed without prior consent of the Secretary. The assignment to Mrs. Crawford was rejected, but not because of any failure on Mr. Norbeck's part, nor because of any defect in his title. It was rejected because Mrs. Crawford never took the trouble to establish her qualifications or to file the required lease bond with the Land Office as she was required to do to have the assignment approved.

On p. 8 of the Petition, the Petitioners argue that under *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), state law alone governs dealings between private parties concerning a federal oil and gas lease. The *Wallis* decision was based on facts that are very much different from those presented here.

As the *Wallis* Court noted, under the federal leasing system, the Mineral Leasing Act of 1920 governs leases on public domain lands, but another act, the Mineral Leasing Act for Acquired Lands, applies to leases on federal lands not considered public domain. See, *Wallis*, 384 U.S. at 65, n. 2. In that case, Wallis filed lease applications on certain lands under the Act for Acquired Lands. He then transferred his interest in the applications to Pan American. Wallis later filed separate applications on the same lands under the Mineral Leasing Act of 1920. The lands were ruled by the Department to be public domain lands. The acquired lands lease applications were rejected, and the Secretary issued leases to Wallis under the Mineral Leasing Act. Pan American sued Wallis for its interests in the leases.

The trial judge ruled that Louisiana law governed the rights of the parties. The state statute of frauds required a written agreement to transfer any interest in an oil and

gas lease. The judge held that the written contracts between Wallis and Pan American only covered acquired lands leases and granted judgment to Wallis. The Court of Appeals reversed, holding that the judge erred in applying state law, and remanded for a new trial applying principles of federal common law.

This Court granted certiorari to address whether rules of federal common law should be fashioned to govern dealings of private parties in an oil and gas lease issued under the Mineral Leasing Act. *Wallis*, 384 U.S. at 67-68. Like the cases cited on pp. 13-14 of the Petition, the central question in the *Wallis* case was whether federal common law should be fashioned and then applied, instead of state law.

The *Wallis* Court followed the "guiding principle . . . that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown" before rules of federal common law should be fashioned. *Wallis*, 384 U.S. at 68.

This Court ultimately found no significant threat to any identifiable federal policy in the *Wallis* case, and thus no need to fashion a body of federal common law, because there is nothing in the Mineral Leasing Act expressing policies inconsistent with the outcome under Louisiana law. *Wallis*, 384 U.S. at 69. The Petitioners have missed this point. *Wallis* stands for the proposition that there is no need to fashion federal common law where applying state law does not conflict with federal policy. That is not the same as saying that state law must always be applied even where it conflicts with the express provisions of the federal statute. As the *Wallis* Court pointed out, "[i]f there is a federal statute dealing with a general subject, it is a prime repository of federal policy . . . ." *Wallis*, 384 U.S. at 69.

This case is much different than *Wallis*. The Respondent does not argue that federal common law should be fashioned and applied to this case. There is no need to consider any federal common law here because the statute is clear. The Mineral Leasing Act has always expressly stated that federal leases cannot be assigned without

consent by the Secretary. It is clear that Congress has the power to insist on this requirement, and the provisions of the Act are the prime repository of federal policy on the matter. Obviously, that policy does not support the Petitioners' argument that an assignment rejected by the Secretary must still be enforced between the parties under state law.

The lands covered by Lease 021056(b) are owned by the United States. Article IV, Section 3, Clause 2 of the United States Constitution provides that the "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." Congress' constitutional power over the proper administration and disposition of public lands is without limitation. Once Congress has acted in that regard, both the courts and the executive agency have no choice but to follow strictly the dictates of such statutes. *United States v. California*, 332 U.S. 19, 27 (1947).

In *California Coastal Comm'n. v. Granite Rock*, 480 U.S. 572, 580-581 (1987), this Court said:

> This Court has "repeatedly observed" that " '[t]he power over the public lands thus entrusted to Congress [by the Property Clause of the United States Constitution] is without limitations.' " *Kleppe v. New Mexico*, 426 U.S. 529, 539 . . . (1976), quoting *United States v. San Francisco*, 310 U.S. 16, 29 . . . (1940).
>
> * * *
>
> We made clear that "the State is free to enforce its criminal and civil laws" on federal land so long as those laws do not conflict with federal law. [citation omitted].
>
> * * *
>
> [A]s we explained in *Kleppe*:
>
> > "Absent consent or cession a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally

> surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the "Supremacy Clause."

Following this same reasoning, the Court in *Wallis* rejected the argument that if state law controlled dealings between private parties in a federal lease, the Secretary would not be able to protect the United States from unacceptable assignees. The *Wallis* Court pointed out that:

> The Secretary, who must approve all assignments before the lease obligations or record titles are shifted finally, is entirely free to disapprove assignees however valid their assignments may otherwise be.

Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 70 (1966).

The federal policy in the Mineral Leasing Act is against using state law to enforce assignments that have been rejected by the Secretary. The holdings by the Montana Courts below, in refusing to give effect to the rejected assignment to Mrs. Crawford, are fully consistent with this federal policy. It is the Petitioners' argument for enforcing the rejected assignment under state law that conflicts with the Mineral Leasing Act and its policy of subjecting federal lessees to continuing supervision by the Secretary. Indeed, this policy would be lost if unacceptable assignees were allowed to evade it so easily. Nevertheless, the Petitioners are asking this Court to order the Montana Courts to enforce the rejected assignment under state law, contrary to the express provisions of the Mineral Leasing Act. It is the Petitioners' argument that must be rejected.

THE PETITIONERS' "NON-ENTANGLEMENT" THEORY DOES NOT APPLY TO THE MINERAL LEASING ACT

On pp. 8 and 9 of the Petition, the Petitioners rely on *Martin v. National Security Co.*, 300 U.S. 588 (1937) and *McKenzie v. Irving Trust Co.*, 323 U.S. 365 (1945) to argue that the federal policy in the Mineral Leasing Act is "non-entanglement." Neither case is applicable here, since neither dealt with the Mineral Leasing Act, nor its prohibition on lease assignments without consent of the Secretary.

The *Martin* and *McKenzie* cases dealt with assignments of money claims against the United States, not assignments of federal oil and gas leases. Under federal statutes other than the Mineral Leasing Act, the policy behind a restriction on assignments without consent may well be to prevent the government from becoming embroiled in private disputes. That is not true of the Mineral Leasing Act, however (not that the federal government is embroiled in this case). The Mineral Leasing Act is much different than the statutes considered in *Martin* and *McKenzie*, and its purpose of protecting the United States is also much different. Not surprisingly, the Mineral Leasing Act also has a different method of protecting the government.

The unique purpose of the Mineral Leasing Act is to protect the United States as an oil and gas owner and lessor. Its method of providing this protection is by insuring that federal lessees are qualified and responsible for their actions on federal leases. The Act accomplishes this protection by subjecting federal lessees to exacting restrictions and qualification requirements, plus continuing supervision by the Secretary. That is why assignments of federal leases have to be approved by the Secretary. *Boesche v. Udall*, 373 U.S. 474, 477-478 (1963). The United States wants to know and directly control its oil and gas lessees, for the government's own protection, to ensure

that its lessees can and will properly perform their obligations.

The Secretary protected the United States against Mrs. Crawford by rejecting her as an assignee, because she did not establish her qualifications, nor did she file the required lease bond. An assignment of a federal lease that has been rejected by the Secretary should not be enforceable by the assignee under state law. That would nullify the protections of the Mineral Leasing Act.

THE ONLY FEDERAL CASE THAT HAS EVER CONSIDERED THE EFFECT OF A REJECTED ASSIGNMENT HAS HELD THAT THE ASSIGNMENT IS NOT EFFECTIVE TO CONVEY ANY INTEREST TO THE ASSIGNEE

The Petitioners complain on p. 10 of their Petition that the Montana Courts cited only *Oasis Oil Co. v. Bell Oil & Gas Co.*, 106 F.Supp. 954 (W.D. Okla. 1952) in refusing to enforce the rejected assignment. However, *Oasis Oil* is the only federal court decision that has considered the effect of an assignment rejected by the Secretary.

In that case, Oasis Oil agreed to assign one-half of its interest in a federal lease to James Fish in exchange for his agreement to develop the lease. Another party, J. D. Crockett, claimed that Fish had orally agreed to assign him half of his interest in the lease. Under the contract between Oasis and Fish, two wells were drilled on the lease, one a producer and the other a dry hole. However, that was before the Secretary of the Interior refused to approve the assignment to Fish. The evidence was not clear as to why the assignment was rejected, but it appeared to be that not enough information was provided to the Department concerning Fish, and his failure to submit the filing fee. *Oasis Oil Co.*, 106 F.Supp. at 956.

Oasis Oil brought the action against Bell Oil & Gas to recover monies that Bell, as the purchaser of production from the lease, had withheld from Oasis. The Court held as follows:

> Title 30 USCA § 187a provides in part that the assignment of an interest in a government lease must be approved by the Secretary of the Interior before the assignment becomes valid. It also provides for certain contingencies which must be met. This court on the evidence before it cannot say whether the attempted assignment to Fish from Oasis under their contract would or would not be approved, and until such approval was forthcoming, Fish did not receive an interest in the controverted lease. Under these circumstances, Oasis Oil Company was the sole record holder of the lease and was entitled to all of the oil runs from the well on the lease.

Oasis Oil Co., 106 F.Supp. at 957. That is the proper rule, and the one followed by the Montana Courts.

The Petitioners argue on p. 11 of the Petition that if the Montana Courts had applied state law, they would have enforced the rejected assignment between the parties. That is not so.

No court or case has ever held that an assignment rejected by the Secretary is still effective between the parties. Pages 11-12 of the Petition cite *Isaacs v. DeHon*, 11 F.2d 943 (9th Cir. 1926), *Herigstad v. Hardrock Oil Co.*, 101 Mont. 22, 52 P.2d 171 (1935) and *Aronow v. Bishop*, 107 Mont. 317, 86 P.2d 644 (1939), in support of the Petitioners' argument that the Secretary's rejection is meaningless. However, none of these cases dealt with an assignment that had actually been rejected by the Secretary. The *DeHon* line of cases deal with assignments that had not even been considered by the Secretary because they had not been filed for approval.

More importantly, all of these decisions recognize that the assignee cannot claim any interest under an assignment that has been rejected by the Secretary. The *DeHon* case itself held that the assignor could not avoid his assignment simply because it had not been filed with the Land Office for approval, but the Court also acknowledged that "it may be that [the assignees] will lose the

fruits of this litigation by refusal of the Secretary to approve the assignment of the interests in the permit." *Isaacs v. DeHon*, 11 F.2d at 944. The *DeHon* Court acknowledged that if the Secretary rejects an assignment, the assignee cannot enforce any interest under the assignment, regardless.

This case, however, does not deal with mere lack of approval by the Secretary. The assignment to Mrs. Crawford was filed, considered and rejected. In rejecting the assignment, the Land Office exercised its legal authority to refuse to accept an unqualified assignee. The rejection protected the government by making the assignment legally invalid to vest Mrs. Crawford with any rights or responsibilities under the lease. The rejection precluded her from having any contractual relationship with the United States.

THE PETITIONERS HAVE NO CLAIM TO THE RENEWAL LEASES

Page 13 of the Petition refers to a footnote in the *Wallis* case, 384 U.S. at 69, n. 6, that certain sections of the Mineral Leasing Act "basically relate to the rights of private persons vis-a-vis the Secretary." Apparently the Petitioners do not consider the lessee's preference right to renewal leases to be a right vis-a-vis the Secretary. They are wrong.

Privity with the United States is critically important in this case. There are significant rights and responsibilities that a lessee has because of its relationship with the United States as the record title owner of a federal lease. Under the 1920 Mineral Leasing Act, only the record title owner of Lease 021056(b) had a "preferential right" to receive renewal leases after the original lease expired in 1954. The rejected assignment to Mrs. Crawford did not give her the necessary privity with the United States to claim the preference right to renewals. She did not have any right to receive the renewal leases that were issued in 1954 and 1964. In fact, the Land Office

rejected the renewal application that was filed on her behalf. Instead, the renewal leases were properly issued to George Norbeck, the record title owner of the lease, because only he had the necessary privity with the government to claim them.

As pointed out in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 71 (1966), the general principle is "that the transfer of property by the United States to a private party is governed by federal law and only subsequent transfers among private parties are subject to state law." The renewal leases were properly granted by the United States to Mr. Norbeck under the controlling federal law, because the rejected assignment to Mrs. Crawford did not give her any rights vis-a-vis the Secretary to claim the renewal leases. Mrs. Crawford can have no right in the second renewal lease unless and until the Secretary approves an assignment of that lease to her.

THE DECISIONS OF THE MONTANA COURTS REST ON THE INDEPENDENT STATE LAW GROUND OF LACHES

The Petitioners' factual argument on pp. 12-13 of the Petition, on how the private parties treated the rejected assignment, is not only untrue, it is irrelevant to any reason for granting the Petition. Indeed, it is not relevant to anything except the holdings by the State Courts that the Petitioners' claims are barred by laches under Montana law.

The Petitioners' rendition of the facts attempts to distort the true equities between the parties, and lure this Court into reviewing the evidence and second-guessing the findings of fact by the State Courts. However, it is clear that the Montana Courts carefully considered the evidence in deciding ownership and that the Petitioners' claims are barred by equity.

The Petitioners, at pp. 4 and 12 of the Petition, try to raise some question whether Mrs. Crawford ever knew

about the Secretary's rejection of the assignment. However, under the law of Montana, which the Petitioners want to apply here, parties are held to be aware of their rights and obligations where circumstances are such as to put a person of ordinary prudence on inquiry. *Johnson v. Estate of Shelton*, 232 Mont. 85, 90, 754 P.2d 828, 831 (1988). It is beyond dispute that an ordinary prudent person dealing with a federal lease would have known that the assignment had to be approved by the Secretary. The controlling federal statute and the lease itself both said so. A prudent person would have checked the Land Office records to find out whether the assignment had been approved or rejected. Certainly, a prudent person would have known that the twenty-year term of the lease expired in 1954, that new leases had to be issued, and that only the record title owner of the lease had a preference right to receive renewal leases. A prudent person would have taken steps to make sure that the renewal leases were granted by the United States to the proper party.

The Petitioners' argument that the Montana Courts erred in refusing to apply state law to enforce the rejected assignment has no merit. The Montana Courts did apply state law. The Petitioners would have this Court believe that the State Courts decided ownership based on a cold, mechanical application of the Mineral Leasing Act requirement that assignments be approved by the Secretary, without looking at the equities between the parties. However, that is not so.

The Petitioners are correct when they say on p. 15 of the Petition that the Montana Supreme Court followed the reasoning of the State District Court. Actually, the Montana Supreme Court said that "[b]ased on the evidence presented in the record, we agree with the determination of the District Court and affirm the District Court." *Norbeck v. Crawford*, ___ Mont. ___, ___, 836 P.2d 1231, 1234 (1992) (A. 6).

Contrary to the statement on p. 6 of the Petition, however, the State Courts did not restrict their analysis to

the impact of the Secretary's rejection on the legal effect of the assignment. The District Court considered two issues in deciding ownership. In its own words, the Court posed the issues like this (A. 11):

> The question before the Court is the effect of the 1935 assignment of an interest in a federal oil and gas lease on the rights of the parties in light of (1) the rejection and lack of approval by the Secretary of the United States Department of the Interior, and (2) the passage of time and apparent abandonment of the leasehold interest.

In analyzing the second issue, the District Court expressly held that the Petitioners' ownership claims are barred by laches under Montana law (A. 13). Indeed, the Court's decision goes on for pages (A. 13-16) explaining the many reasons why the Petitioners' claims are inequitable and thus barred by the doctrine of laches. One of the primary reasons cited by the Court is that (A. 15):

> From 1935 to present, the [Petitioners] allowed the [Respondent] to continue to be responsible for the obligations under the lease, including the obligation to pay delay rentals (whether actually paid or not), to obtain renewals of the leases, etc.

The District Court correctly noted (A. 12-13) that under 30 U.S.C. § 187a (A. 22), a federal lease assignment is not effective to transfer any interest until the Secretary approves the assignment, and, until then, the assignor remains responsible to the United States to perform all of the lease obligations. This statute specifically states:

> Until such approval [by the Secretary], however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed.

These provisions were added to the Mineral Leasing Act in 1946 as Section 30A. As explained in the leading treatise on the subject, *Law of Federal Oil and Gas Leases*, Vol. 1, § 10.02[3], pp. 10-7 through 10-10 (1991):

> Section 30A of the Mineral Leasing Act [30 U.S.C. § 187a] conceives of assignments and subleases, when approved, as effecting a total substitution of the assignee or sublessee for the assignor or sublessor, as if the former "were the original lessee." This concept is embodied in the Interior Department's doctrine of record title and assignments of record title, a doctrine which pre-dates the enactment of Section 30A.
>
> * * *
>
> As used by the Department, "record title" . . . refers to a particular type of interest and only as that interest is shown in the records of the Bureau of Land Management.
>
> * * *
>
> The distinctive feature of an assignment of record title is that by such an assignment "the record title of the assignor to the interest transferred is conveyed to the assignee and the latter assumes the contractual relationship of the assignor to the United States to the extent of the interest which is transferred." Thus, the Department regards an assignment of record title as effecting a kind of novation, whereby the assignor's contractual relationship with the lessor is extinguished and the approved assignee is substituted fully for the assignor, becoming the new lessee, or record title holder of the lease. Accordingly, it is to the record title holder that the Department will direct crucial lease notices pertaining to lease termination, cancellation, and other matters, and it is generally the record title holder that the Department will hold responsible for lease obligations such as rental, royalties, and lease operations.

Because the assignment to Mrs. Crawford was rejected by the Secretary, Mr. Norbeck and his successors have been responsible, in the eyes of the government, for

accruing lease rentals, as well as royalty payments on production allocated to the second renewal lease.

Fidelity Gas and Shell Oil have performed operations under the second renewal lease as the agents of George Norbeck and his successors. Under Montana law, Mr. Norbeck and his successors, and ultimately the Respondent, are legally responsible for all operations under the renewal leases, including any environmental harms. See, Montana Code Annotated §§ 28-10-601, 28-10-602(1), 75-10-701(8)(a), and 75-10-715(1)(a).

Mrs. Crawford and her heirs, on the other hand, have never been charged with or undertaken any of these responsibilities. Nevertheless, they are now claiming all of the production proceeds allocated to the second renewal lease, after sleeping on their rights for over half a century.

Contrary to the statement on p. 8 of the Petition, the Respondent is not reaping a windfall, since she has to answer for the lessee's obligations under Lease 021056(b), as well as for operations on the lease. It is the Petitioners that are arguing for a windfall. They are claiming all of the benefits of the lease, though they have never accepted or performed any of the lessee's responsibilities.

The Montana doctrine of laches is well set out in the District Court's decision (A. 13-14). Laches is a creature of equity. There is no absolute rule as to what constitutes laches. Each case must be decided on its own particular circumstances. Laches is principally a question of the inequity of permitting a claim to be enforced. Laches means negligence in the assertion of a right. It is the practical application of the maxim in Montana Code Annotated § 1-3-218, that "[t]he law helps the vigilant before those who sleep on their rights." Applying the doctrine of laches to the facts of this case, the District Court determined that the Petitioners forfeited any rights they may have had to the proceeds of production to date (A. 16).

Page 15 of the Petition mentions that the Montana Supreme Court, in its decision, distinguished the case of *Gibbons v. Pan American Petroleum Corp.*, 262 F.2d 852 (10th Cir. 1958). To the extent the Montana Supreme Court distinguished *Gibbons*, it was for purposes of applying laches under state law. The *Gibbons* decision points out that it was not until 1954 that Congress amended the Mineral Leasing Act so that federal leases issued thereafter would terminate automatically for nonpayment of rentals. For federal leases issued before then, the unpaid rentals accumulated as a debt of the record title lessee to the United States. *Gibbons v. Pan American*, 252 F.2d at 854-855. The Montana Supreme Court considered this rule in affirming the District Court's ruling on laches, stating that:

> The Department of Interior viewed Norbeck as the record owner of the lease. The renewals were made and accepted in his name. A renewal submitted on behalf of Mrs. M. H. Crawford was rejected because the assignment had never been approved. Delay rentals became the responsibility of Norbeck, whether he paid them or not.

Norbeck v. Crawford, ___ Mont. ___, ___, 836 P.2d 1231, 1234 (1992) (A. 5).

The Petition seems to suggest that the Montana Supreme Court did not affirm the District Court's ruling that the Petitioners' claims are barred by laches. However, that is not so. In affirming the District Court, the Montana Supreme Court said:

> The material facts are not in dispute. Norbeck made an assignment to Mrs. Crawford but she failed to perfect the assignment with the Department of Interior pursuant to the language of the original lease and 30 U.S.C. § 187a. Later attempts were made to have Mrs. Crawford pay rentals but without success. As a result the obligations under the lease remained with Norbeck.

Norbeck v. Crawford, ___ Mont. ___, ___, 836 P.2d 1231, 1234 (1992) (A. 5). The Court's statement that "the obligations under the lease remained with Norbeck," is aimed directly at the District Court's laches holding. There was no reason for the Court to mention the lease obligations apart from laches and the equities involved in deciding the ownership issue. There is no doubt that the Supreme Court also affirmed the District Court's ruling on laches.

CONCLUSION

The State Court decisions in this case do not conflict with any decision of this Court or any United States court of appeals. To the extent there is any federal question in this case, the Montana Courts decided it correctly. An assignment of a federal lease that has been rejected by the Secretary cannot be enforced under state law. Such a rule would effectively eliminate the Mineral Leasing Act requirement that assignments be approved by the Secretary, and the federal policy inherent in that requirement.

Furthermore, the Montana Courts held, based on the facts of this case, that the Petitioners' claims are barred by the equitable doctrine of laches, an independent state law ground.

The State Courts properly looked to the Mineral Leasing Act in determining the legal effect of the rejected assignment, and to assess the equities between the parties, in deciding ownership of the disputed interest. The Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 92-875

In The
Supreme Court Of The United States

OCTOBER TERM, 1992

DIANE E. HONEYCUTT, Fern E. Honeycutt, Ellen Goldsworthy, Ralph Vernon Honeycutt, Calvin Guy Honeycutt, Eileen A. Honeycutt, Marjorie J. McGuire, Olin I. McGuire, Alfred W. McGuire, Shirley J. MacDonald, Margaret McCollum, Lena Nicholson, Helen Harder, Raymond Eisele, Frank Eisele, Darrell Eisele, Marie Holdren

Petitioners,

v.

JANE S. NORBECK, Trustee of the JANE NORBECK Trust dated November 20, 1963

Respondents

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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December 28, 1992

In this case, the Court is faced with two possible federal policies:

The policy enunciated in Respondent's Opposition to the Petition for Certiorari (protection of the federal government from unqualified mineral lessees) is completely fulfilled by the statute identified in the Petition without forging new federal common law to supersede state law rights.

The federal policy of nonentanglement in private disputes over assignments, however, would be eviscerated by the Montana Supreme Court's decision and Respondent's characterization of federal law.

I. RESPONDENT'S POSITION IGNORES FEDERAL REGULATIONS.

Respondent argues that the "federal policy in the Mineral Leasing Act is against using state law to enforce assignments that have been rejected by the Secretary." Brief in Opposition, P.18. Respondent's position ignores explicit federal regulations and court decisions.

The regulations implementing the Mineral Leasing Act state, in part: "Transfers [of record title or of operating rights] are approved for administrative purposes only. **Approval does not warrant or certify that either party to a transfer holds legal or equitable title to a lease.**" 43 C.F.R. § 3106.7-1 (1991)(emphasis added).

As this Court said in *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 70, n. 8 (1966): "Where there is a private dispute as to the validity or effect of an assignment [under the Mineral Leasing Act of 1920], the Secretary does not decide the question and he will not approve the assignment or take other action until the parties settle their dispute in court."

Even the District Court in this case found that "First the Court determines as a matter of law that the rejection of the assignment of federal lease in this case does not necessarily render the assignment void as between the parties." Appendix, P. 12.

II. THE FEDERAL GOVERNMENT IS PROTECTED.

Respondent posits a danger to the federal government if state law controls assignments between private parties involving a federal lease. Brief in Opposition, P. 29. In fact, the federal government is more than adequately protected by statute. Rather than indirectly violating federalism through an unwarranted and unilateral intrusion into state law rights, Congress chose a more direct protection where due process would be respected.

Sections 30 and 31 of the Mineral Leasing Act (41 Stat. 437) provide for forfeiture or cancellation of any lease issued. The federal government does not need Respondent's "belt and suspenders" approach of nullifying assignments otherwise valid under state law. (In addition, contrary to Respondent's concern over continuing liability by the original lessee after the assignment was not approved by the Secretary, Section 30 also provides for voluntary relinquishment by any lessee.)

III. RESPONDENT'S THEORY POSES A DANGER TO THE FEDERAL GOVERNMENT.

Unlike the "non-entanglement" approach explicitly stated in the regulations and upheld in *Wallis*, Respondent's theory **would** endanger the federal government. If the Secretary's action in administratively registering a lease assignment were conclusive on private parties' rights, the federal government would quickly become entangled in every dispute over private parties' rights.

If a private assignment were rejected, the Secretary would be required to participate to explain why. If a private assignment were accepted by the Secretary, but later challenged, the Secretary's actions would be brought in as evidence of validity. Either way, the Secretary would quickly become entangled in disputes which are no concern of the federal government, and which the regulations explicitly seek to avoid.

The better public policy is that stated in the regulations: **non-entanglement**. "In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin v. National Surety Co.*, 300 U.S. 588, 594 (1937), *citing*, *Hobbs v. McLean*, 117 U.S. 567, 576 (1886).

IV. THERE IS NO SEPARATE OR INDEPENDENT STATE LAW GROUND FOR DECISION.

Respondent says the 16th Judicial District Court's finding of laches is a bar to review (the Montana Supreme Court never mentioned laches, but did affirm the lower court). The finding of laches, however, was neither separate nor independent of the misinterpretation of federal law by the state courts.

As the District Court stated in its description of the first factor it considered in applying laches: "In addition, Mrs. Crawford did nothing to perfect her interest in the lease, **i.e., obtain the consent of the Secretary of the Interior.**" Appendix, P. 15 (emphasis added). In fact, the undisputed fact is that Mrs. Crawford registered the lease in the land records, all she was required to do to perfect her interest in the lease **under state law.** Petition for Certiorari, P. 4.

CONCLUSION

This Court should issue a summary opinion in this case instructing the Montana Supreme Court to follow *Wallis*. In the alternative, this Court should grant a petition for certiorari to the Montana Supreme Court to allow a full review of these important points.

Respectfully Submitted,

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